THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 2019-001900

Duke Energy Carolinas, LLC...Appellant- Respondent,

v.

The South Carolina Office of Regulatory Staff, Hasala Dharmawardena, CMC Recycling, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Inc., The South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc...Respondents,

of whom,

South Carolina Energy Users Committee is.....................................Respondent-Appellant.

Appellate Case No. 2019-001904

Duke Energy Progress, LLC..Appellant,

v.

South Carolina Office of Regulatory Staff, Nucor Steel-South Carolina, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Incorporated, The South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc....Respondents.

FINAL BRIEF OF
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September 24, 2020

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COUNTERSTATEMENT OF ISSUES PRESENTED

I. Did the Commission appropriately determine that the Companies were not entitled to recover certain coal ash costs from their South Carolina customers, when those costs result from a North Carolina law from which the Companies' South Carolina customers receive no benefit and into which they had no political input?

II. Did the Commission appropriately determine that certain coal ash expenses the Companies sought to impose upon their South Carolina customers were not just and reasonable when they exceed what the Federal Government has determined to be sufficient and were the result of the Companies' criminal negligence that caused a catastrophic environmental disaster in North Carolina but had little to no effect in South Carolina?

III. Did the Commission appropriately determine that disallowing CAMA-specific costs did not constitute a facial violation of the Commerce Clause of the United States Constitution where the Commission's Orders set just and reasonable rates and regulate even-handedly to effectuate a legitimate public interest?

IV. Was the Commission correct in disallowing coal ash litigation expenses when the Companies could not provide sufficient documentation to support the claimed expenses?

V. Was the Commission correct in disallowing a return on certain deferrals upon a determination that the appropriate balance of the Companies' and their customers' interests required the recovery of deferred operating costs and a return on capital costs but not a return on deferred operating costs?

STATEMENT OF THE CASE

These consolidated appeals stem from the rulings of the Public Service Commission of South Carolina ("PSC" or "Commission") in Docket Nos. 2018-318-E and 2018-319-E, the Applications of Duke Energy Progress, LLC ("DEP") and Duke Energy Carolinas, LLC ("DEC," collectively DEP and DEC are referred to herein as "Duke" or the "Companies") respectively, for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order. The issues on appeal in the two underlying cases are substantively the same.

In February of 2014, DEC's mismanagement caused an environmental disaster by discharging 39,000 tons of coal ash into the Dan River in North Carolina. The Companies pled guilty to criminal negligence in North Carolina on charges stemming from the catastrophic discharge of coal ash into US waters. As a result of these events, the North Carolina legislature enacted the Coal Ash Management Act of 2014 ("CAMA"), N.C. Gen. Stat. § 130A-309.200 et seq., requiring DEP and DEC to undertake remediation efforts at their coal-generating plants in North Carolina, which led to those companies incurring substantial costs that are not required by either South Carolina or federal law. The principal issue in the proceedings below, and in this appeal, was whether DEP and DEC should be allowed to charge their South Carolina customers a significant portion of those costs, when they were not required as a matter of South Carolina or federal law, when the South Carolina customers had no input into or influence on the North Carolina legislation, and when the remediation required by CAMA accorded no direct benefit to the South Carolina customers.

I. DEP

On November 8, 2018, DEP filed an Application with the Commission requesting authority to adjust and increase its electric rates, charges, and tariffs effective June 1, 2019 (the "DEP

Application"). In its Application, DEP sought recovery, through customer rates, of costs that were incurred, estimated, and deferred. The Commission convened a full evidentiary hearing, which took place from April 11, 2019 through April 17, 2019, and two public night hearings, held on April 1, 2019, and April 2, 2019.[1] Based upon a thorough and detailed review of all evidence presented to it, the Commission issued Order No. 2019-341.

In Order No. 2019-341, the Commission found that it would be unreasonable to impose approximately $333 million in CAMA-related expenses onto DEP's South Carolina customers, when those expenses result from a North Carolina law and exceed the standards set by the United States Environmental Protection Agency ("EPA"), known as the CCR Rule, that are applicable to states, such as South Carolina, which have not enacted more stringent standards. (R. pp. 39-52, 104; see also R. pp. 123-128). The Commission determined that the disastrous spill of coal ash into the Dan River, for which Duke pled guilty to criminal negligence, was the impetus for the enactment of CAMA and that it would not be just and reasonable for DEP's South Carolina customers to pay costs incurred as a result of the Company's negligence and a unilateral act of the North Carolina General Assembly in response to that negligence. (R. pp. 48-52, 104). Accordingly, the Commission determined that it would not be just or reasonable to require DEP's South Carolina customers to bear the burden of certain North Carolina Coal Combustion Residual ("CCR") costs incurred to meet standards set by the North Carolina legislature in CAMA, which exceeded those set by the EPA in the CCR Rule. (R. pp. 50-52). The Commission disallowed only those costs that were incurred solely due to North Carolina's CAMA. Costs that DEP would have expended had it been able to comply with only the standards as set forth in the Environmental

[1]The night hearings provided DEP's South Carolina service territory customers with the opportunity to provide testimony regarding DEP's filed Application.

Protection Agency's CCR Rule were ordered recoverable. (R. pp. 50-52).

Regarding litigation expenses relating to coal ash that DEP sought to force South Carolina customers to pay, Order No. 2019-341 concluded that DEP failed to substantiate $390,000 in litigation expenses for which it sought recovery. (R. pp. 69-75). In an effort to ensure that no improper legal expenses were included in the South Carolina rates, particularly in light of the many legal expenses flowing from DEP's pleading of criminal negligence related to the 2014 Dan River coal ash spill, ORS asked DEP to produce the underlying invoices for the legal expenses claimed. (R. pp. 72-73). The Commission followed established precedent in holding that DEP has the burden to demonstrate it made every reasonable effort to minimize costs. (R. p. 75). DEP failed to provide the Commission with evidence that justified passing these expenses along to ratepayers and, as a result, the Commission determined that DEP may not recover these coal ash-related litigation expenses. (R. pp. 73-75).

Regarding deferred costs, the Commission ruled that DEP may recover all deferred costs (with the exception of CAMA-specific costs) but may earn a Weighted Average Cost of Capital ("WACC")[2] return on only its capital-related deferred costs. (R. pp. 91-98). In other words, the Commission allowed full recovery of all deferred costs, but allowed a cost of capital return only on capital-related deferred costs and not on ordinary operating expenses. The Commission found that this approach "achieves an equitable sharing of deferred costs between customers and shareholders that binding case law requires." (R. p. 97).

[2] The Weighted Average Cost of Capital is the blended costs of the utility's capital structure components, each weighted by the market value of that capital component. Valuing Prof. Practices & Licenses § 11.09, 4th Ed. (2020). "In other words, it is the average rate of return that a business enterprise expects to pay to compensate different types of investors." Id.

Subsequent to the Commission issuing Order No. 2019-341, DEP filed a timely Petition for Rehearing and/or Reconsideration. The Commission then issued Order No. 2019-454, which held for DEP on some matters but denied the parts of DEP's Petition for Rehearing and/or Reconsideration of Order No. 2019-341 related to the issues in dispute in this appeal.

On November 15, 2019, DEP appealed Commission Order Nos. 2019-341 and 2019-454.

II. DEC

On November 8, 2018, DEC filed an Application with the Commission requesting authority to adjust and increase its electric rates, charges, and tariffs effective June 1, 2019 (the "DEC Application"). The DEC Application sought recovery, through customer rates, of costs that were incurred, estimated, and deferred. Following a full evidentiary hearing, which occurred from March 21, 2019 through March 27, 2019, three public night hearings, held on March 12, 2019, March 13, 2019, and March 14, 2019, and consideration of all evidence presented before it, the Commission issued Order No. 2019-323. In the relevant portions of Order No. 2019-323, the Commission found it would be unreasonable to impose approximately $470 million in certain coal ash expenses onto DEC's South Carolina customers, when those expenses exceed what would be incurred to comply with the EPA's CCR Rule and resulted solely from DEC's compliance with CAMA. (R. pp. 3927-3939). Following historical practice, the Commission allocated expenses using cost causation principles.

Regarding litigation expenses, DEC provided limited information regarding the nature of the legal expenses, which made it difficult to determine whether the expenses were the result of management decisions or whether the expenses resulted in an outcome economically beneficial to DEC's customers. (R. p. 3949). Noting that it is incumbent upon the applicant utility to carry its burden of proof, the Commission determined that the limited amount of information DEC provided did not rise to a level sufficient to justify passing the expenses onto DEC's customers. As a result, the Commission disallowed recovery of $575,000 in litigation expenses. (R. p. 3949).

Regarding deferred costs, the Commission found that DEC may earn a return of all deferred costs (with the exception of CAMA-specific costs) but a WACC return only on deferred capital costs. (R. p. 3910). Thus, as in DEP's case, the Commission allowed full recovery of all deferred costs, but allowed a cost of capital return only on capital-related deferred costs and not on ordinary operating expenses.

Subsequently, DEC filed a timely Petition for Rehearing and/or Reconsideration. The Commission then issued Order No. 2019-455, which held in favor of DEC on some matters but denied the parts of DEC's Petition for Rehearing and/or Reconsideration of Order No. 2019-323 related to the issues on appeal.

On November 15, 2019, DEC appealed Commission Order Nos. 2019-323 and 2019-455.

STATEMENT OF FACTS

The Companies are investor-owned public utilities operating in both South Carolina and North Carolina. (R. pp. 144-145 ¶ 5; R. p. 3981 ¶ 5). Both DEC and DEP operate under the laws of the State of South Carolina, engaging in the business of generating, transmitting, distributing, and selling electric power and energy to their South Carolina customers. (Id). As public utilities under the laws of both South Carolina and North Carolina, they are subject to the unique regulations, laws, and regulators of each state. In South Carolina, they are subject to the jurisdiction and regulations of the Public Service Commission of South Carolina. In North Carolina, they are subject to the jurisdiction and regulations of the North Carolina Utilities Commission. They also are subject to the laws passed by the respective legislatures in these two states. As companies and public utilities operating in multiple states, they do so with the knowledge that the decisions, regulations, and laws of those jurisdictions may differ substantially and that there is no requirement the South Carolina Public Service Commission and North Carolina Utilities Commission be uniform in their decisions regarding what constitute just and reasonable rates. Operating in both states on this understanding and condition is a voluntary business decision of the Companies for which they receive a monopoly franchise.

In the generation, transmission, and distribution of electricity, the Companies incur costs that they recover through a variety of mechanisms and in some cases, but not all, allocate proportionally between their North Carolina and South Carolina customers.[3] The Commission has historically utilized cost causation principles in determining the appropriate allocation of costs and in deciding whether direct assignment of costs to the customers in one state (and not the other) is just and reasonable.[4] According to Company witness Hager, when allocating costs, "[c]ost components identified as having a direct relationship to a jurisdiction…are directly assigned to that jurisdiction before any allocation occurs." (R. p. 595, lines 19-23; R. p. 5006, lines 21-23 (emphasis added)). The Companies acknowledge in their brief there are "statutory provisions reflect[ing] policy decisions by lawmakers that impose[] additional, incremental costs on regulated utilities" for which recovery through rates occurs only from customers in the enacting jurisdiction. (Companies' Brief p. 27). In keeping with this approach, it is only after making appropriate direct assignments of costs that the Commission historically has applied an expense allocator for the

[3] While the Companies seek recovery through rates, those rates are determined via different mechanisms (i.e. Annual Fuel Proceedings, Rate Cases, and Demand Side Management/Energy Efficiency proceedings, etc.). See S.C. Code Ann. §§ 58-27-865, 58-27-870, and 58-37-20.

[4] See, e.g., costs associated with S.C. Code Ann. § 58-39-110, *et seq.*; see also Commission Order No. 2004-501 (Oct. 15, 2004) (when changing allocation factors following merger of Piedmont Natural Gas Company and the North Carolina Electric Gas Corporation, the Commission removed "certain costs …that are solely attributable to North Carolina, and then [split] the remaining balance based on the current Commission-approved demand cost allocation factors….").

Companies, to the extent it is found to be just and reasonable. E.g. Commission Order No. 1999-690 in Docket No. 1999-259-C (Oct. 4, 1999) ("under the principles of cost causation, the costs incurred in developing CLEC OSS should be recovered from the cost-causer").

The Companies' electric power generation from the burning of coal dates back to the 1920's. (R. p. 628, lines 5-6; R. p. 4607, lines 13-14). All of the Companies' coal power plants produce coal combustion residuals ("CCRs") as a direct and unavoidable byproduct of the coal combustion process. (R. p. 4607, lines 14-16; R. p. 4503, lines 2-3; R. p. 628, lines 6-7; R. p. 706, lines 2-3).

In June 2010, the EPA proposed national criteria to regulate the disposal of CCRs and the operation and closure of active CCR landfills, along with existing and inactive CCR surface impoundments. (R. p. 701, lines 14-17; R. p. 710, line 18-p. 711, line 1; R. p. 4498, lines 16-19; R. p. 4507, line 18-p. 4508, line 1). Approximately five years later, in April 2015, the EPA published the final CCR Rule in the Federal Register. (R. p. 701, lines 17-18; R. p. 898, lines 7-9; R. p. 4498, lines 19-20; R. p. 4769, lines 1-3). In passing the CCR Rule, the EPA sought to create a set of nationwide criteria addressing the disposal of CCR. 80 Fed. Reg. 21302, 21303. Accordingly, the EPA promulgated national standards that ensured the risks associated with human health and the environment associated with CCRs were "effectively addressed[ed]." Id. at 21411. While the CCR Rule is sufficient to effectively address risks associated with CCRs, states are not prohibited from adopting more stringent measures if they wish to do so. 80 Fed. Reg. 21302, 21430.

With Commission oversight, the Companies have been able, as a general matter, to provide their South Carolina customers with reliable electricity at just and reasonable rates. However, the

Companies have, at times, failed to act in an efficient and economical manner, and at times have acted irresponsibly and even unlawfully. Such was the case with the Dan River catastrophe.

In May of 2011, two engineers recommended spending $20,000 to pay for video equipment to scope a pipe that later failed at DEC's Dan River Steam Station near Eden, North Carolina. (R. p. 822, lines 11-13; R. p. 4859, lines 7-10; R. pp. 1826-1843, 1898-1976, 5400-5478). The Company engineers were denied their request, and therefore did not receive the warning the video could have provided that the pipe was about to fail. Subsequent to DEC's decision to ignore the advice of its own engineers, the Dan River Plant station manager contacted the V-P of Transitional Plants and Merger Integration, who approved the budgeting for the plant, to affirm the environmental harm that would result from a pipe failure. (R. pp. 1826-1843, 5267-5320). Upon being denied again, the request for video equipment was once again submitted in May of 2012 and once again denied. (R. pp. 1826-1843, 5400-5478). From at least January 1, 2012 through February 2, 2014, DEC failed to take reasonable steps to minimize or prevent discharge of coal ash into the Dan River and failed to properly operate and maintain the Dan River coal ash basins and the related stormwater pipes located beneath the Primary Coal Ash Basins. (R. pp. 1826-1843, 5400-5478).[5] Duke management ignored recommendations from its engineers and failed to properly maintain its ash retention ponds. (See R pp. 1826-1843, 5400-5478).

As a result, from February 2, 2014 through February 8, 2014, approximately 27 million gallons of coal ash wastewater and an estimated 39,000 tons of coal ash were unlawfully discharged into the Dan River at the Dan River Steam Station's primary coal ash basin. (R. p. 898, lines 13-16; R. p. 4769, lines 7-10). The coal ash traveled north more than 62 miles down the Dan

[5] Similarly, DEP allowed unauthorized coal ash discharges into the waters of the United States. (R. pp. 1826-1843).

River and into the John H. Kerr Reservoir on North Carolina's border with Virginia. (R. p. 898, line 16; R. pp. 1826-1843; R. p. 4769, line 10; R. pp. 5400-5478). Accordingly, the Dan River spill caused no (or only *de minimis*) environmental harm in South Carolina. Court cases ensued, and the Companies' subsequent plea agreements (see R. pp. 1844-2169, 5267-5591) acknowledged that they were criminally and civilly negligent in their operation and maintenance of the coal ash impoundments for years prior to the spill.[6] (R. p. 899, lines 16-22; R. p. 4770, lines 2-8).

In response to the Dan River disaster, the North Carolina General Assembly passed CAMA. This legislation, in part, requires the closure of existing coal ash ponds as well as conversion from wet ash to dry ash handling. (R. p. 822, lines 17-20; R. p. 4859, lines 13-17). According to Kevin W. O'Donnell, a witness for intervenor South Carolina Energy Users Committee ("SCEUC"), Duke management made specific decisions that resulted in the coal ash spill in North Carolina, which in turn led to the enactment of CAMA. (R. p. 823, lines 32-33; R. p. 4863, lines 29-31).

In order to accurately evaluate and determine the marginal increases in costs brought about by CAMA and subsequent amendments, above and beyond what the federal CCR Rule requires, ORS retained Dan Wittliff, a licensed professional engineer with extensive experience working with other utilities, compliance, and coal remediation. (R. p. 875, line 13-p. 877, line 17; R. p. 888, lines 6-19; R. p. 1036, lines 11-14, 18-23; R. p. 4757, lines 1-23; R. p. 4759, lines 3-16). According to Mr. Wittliff, the unpermitted discharge of coal ash into the Dan River played a deciding role in the development of CAMA in its present form, which had the effect of not only

[6] "Criminal negligence" in North Carolina is defined as "recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." State v. Jones, 538 S.E.2d 917, 923 (N.C. 2000).

accelerating the timing of remedial action required, but also limiting the options to remediate and close CCR impoundments in a much more stringent manner than would otherwise have occurred under the CCR Rule. (R. p. 898, lines 13-23; R. p. 4769, lines 10-17). Mr. Wittliff also testified to an excerpt from an early version of CAMA in which the North Carolina General Assembly attributed CAMA to the Dan River spill. (R. p. 901, line 3-p. 902, line 15; R. p. 4771, line 5-p. 4772, line 41).

Witness Julius A. Wright for the Companies testified there is no doubt the Dan River spill prompted the North Carolina General Assembly to examine North Carolina and national coal ash disposal policies and regulations, and out of this investigation came CAMA. (R. p. 631, lines 5-9; R. p. 4611, lines 5-9). As witness O'Donnell testified, quoting Duke Energy's director of environmental policy, Mark McEntire, the Companies recognized that "[t]he NC law came before the CCR [Rule]," and "NC CAMA that is <u>specific</u> to NC is generally driving decision making on a management perspective on coal ash .... From a comparison perspective the CAMA is generally a good bit more stringent." (R. p. 825, lines 14-18; R. p. 4876, lines 13-18 (emphasis added)). The record makes clear, and the Commission reasonably concluded, that while both the federal CCR Rule and North Carolina's CAMA dictate the handling of coal ash basin closures, the CAMA requirements are <u>specific to North Carolina</u> and both <u>stricter</u> and <u>costlier</u> than the federal CCR Rule. (R. p. 904, lines 19-22; R. p. 4775, lines 1-4).

Mr. Wittliff testified as to specific differences between CAMA and the CCR Rule. (R. pp. 904-908, 4775-4779). According to Mr. Wittliff, CAMA increases costs over the EPA's CCR because it: imposes stricter closure mandates; imposes stricter closure methods; accelerates timelines for compliance; applies to sites not impacted by the EPA's CCR Rule; requires beneficiation,[7] which is generally more expensive than other closure options and is not mentioned at all in the CCR Rule; requires conversion to dry ash disposal; and results in certain plants being designated as "High Priority," which burdens those plants with restrictions that are not in place under the EPA's CCR Rule. (R. pp. 904-908; R. p. 881, lines 14-16; R. pp. 4775-4778; R. p. 4854, lines 19-23). Mr. Wittliff conducted an extensive analysis over the span of two years to determine the amount of expenses the Companies incurred that resulted solely from the more stringent requirements imposed by CAMA. (R. p 1037, lines 5-8). Mr. Wittliff's results are found in the record and are summarized in the tables below:

[7] As it relates to CCR and the requirements of CAMA, beneficiation is the physical treatment of excavated CCR so that the processed CCR can be beneficially reused in cement-like products. (R. p. 907, lines 2-5).

Table 5.4: Duke Energy Progress Reimbursement Request and Disallowances					
Plant	Cost Data				
	Total Project (from SCORS DEP 10-08)	Amount Requested (1/1/15-9/30/18, SCORS DEP 10-08)	Disallowance	Rationale	Allowance
Asheville	$ 452,038,793	$ 191,934,196	$ 98,220,932	CAMA High Priority - Accelerated Schedule -- Allow what would have been incurred for "Cap-In-Place" only	$ 93,713,264
Cape Fear	$ 504,918,488	$ 33,631,199	$ 33,631,199	No Federal CCR Requirements	$ -
HF Lee	$ 568,383,919	$ 54,775,180	$ 9,207,711	Beneficiation - CAMA Only -- Allow Engineering and Planning	$ 45,567,469
Mayo	$ 206,749,586	$ 25,384,168	$ -	Federal CCR Compliant	$ 25,384,168
Robinson	$ 179,561,777	$ 11,431,675	$ -	Federal CCR Compliant and SCDHEC Requirements	$ 11,431,675
Roxboro	$ 349,803,401	$ 34,070,691	$ -	Federal CCR Compliant	$ 34,070,691
Sutton	$ 493,219,171	$ 255,525,554	$ 186,376,226	CAMA High Priority - Accelerated Schedule -- Allow Engineering and Planning`	$ 69,149,328
Weatherspoon	$ 209,724,346	$ 28,287,429	$ 6,044,240	Excavation and Beneficiation Off-Site -- CAMA -- Allow E&P Through 9/30/17 and Half Costs 10/01/17 through 9/30/18	$ 22,243,189
TOTAL	**$ 2,964,399,482**	**$ 635,040,092**	**$ 333,480,308**		**$ 301,559,784**

(R. p. 928, line 1).

Table 5.4: Duke Energy Carolinas Reimbursement Request and Disallowances					
Plant	Cost Data				
	Total Project (from SCORS DEC 10-09)	Ask (from Kerin 10)	Disallowance	Rationale	Allow
Allen	$ 266,571,170	$53,059,021	$ 0-	Federal CCR Compliant	$53,059,021
Belews Creek	$ 348,719,792	$50,535,423	$ 0-	Federal CCR Compliant	$50,535,423
Buck	$ 577,379,599	$80,765,334	$36,544,788	Beneficiation -- CAMA only	$44,220,546

Cliffside	$ 264,216,906	$66,076,839	$ 0-	Federal CCR Compliant	$66,076,839
Dan River	$ 259,894,677	$167,426,449	$116,669,019	CAMA High Priority - Accelerated Schedule	$50,757,430
Marshall	$ 52,048,416	$ 43,212,613	$ 0-	Federal CCR Compliant	$43,212,613
Riverbend	$ 433,114,608	$316,680,665	$316,680,665	No Federal CCR Requirements	$ 0-
W.S. Lee	$ 278,579,144	$98,449,950	$ 0-	Federal CCR Compliant & SCDHEC Requirements	$98,449,950
TOTAL	**$2,780,524,312**	**$876,206,294**	**$469,894,472**		**$406,311,822**

(R. p. 4793, line 5).

In contrast to North Carolina's stringent CAMA legislation, and contrary to the assertions made by the Companies in their brief, South Carolina has adopted no law or policy that exceeds the requirements of the EPA's CCR Rule. (R. p. 904, lines 8-9; R. p. 4774, lines 20-23). The South Carolina General Assembly has not passed legislation that is identical or even similar to North Carolina's CAMA. (R. p. 904, lines 8-9; R. p. 4774, lines 20-23). South Carolina Regulations exempt CCR impoundments from solid waste designation. (R. p. 904, lines 9-10). S.C. Code Ann. Reg. 61-79.261. While the South Carolina Department of Health and Environmental Control ("SCDHEC") has entered into two consent agreements with the Companies for two coal power plants in South Carolina, this was done only after the Companies approached SCDHEC and negotiated those agreements. (See R. p. 540, lines 11-22; R. p. 4845, lines 10-21; R. p. 4847, lines 1-5; R. p. 5995). DEC entered into a Consent Agreement with SCDHEC in September 2014, and DEP entered into a Consent Agreement with SCDHEC in July 2015, after the North Carolina General Assembly passed CAMA. (R. p. 701, lines 19-21; R. p. 938, line 19-p. 939, line 1; R. p. 4498, lines 21-23). See N.C. Session Law 2014-122. Pursuant to these Consent Agreements, the Companies agreed to excavate their coal ash basins and ash storage areas at W.S. Lee Steam Station in Anderson County, South Carolina, and Robinson Steam Station in Darlington County, South Carolina, respectively, and SCDHEC in return covenanted not to sue Duke Energy. (R. p. 701, lines 21-23; R. p. 958, line 6-p. 960, line 2; R. pp. 2448-2460; R. p. 4498, line 23-p. 4499, line 2; R. pp. 5994-6004). The Companies thus already have received their *quid pro quo* from the SCDHEC Consent Agreements – they avoided being sued by SCDHEC over the South Carolina coal ash basins.

Through the DEC and DEP Applications, the Companies requested that the Commission allow them to charge their South Carolina customers costs incurred solely as a result of a North Carolina law, which was passed in response to the Companies' criminal negligence, which did not benefit South Carolina customers in any quantifiable manner, and into which South Carolina citizens had no political input. The Commission, acting according to its statutory responsibility, appropriately declined to do so and prohibited the Companies from including costs the Commission found to be unreasonable in rates charged to the Companies' South Carolina customers.

STANDARD OF REVIEW

The standard of review applicable to decisions of the Commission is set forth in the South Carolina Administrative Procedures Act:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions on fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code § 1-23-380.

"The Public Service Commission is recognized as the 'expert' designated by the legislature to make policy determinations regarding utility rates; thus, the role of a court reviewing such decisions is very limited." Patton v. S.C. Pub. Serv. Comm'n, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984). The Commission sits as the trier of facts, akin to a jury of experts. So. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n, 270 S.C. 590, 597, 244 S.E.2d 278, 282 (1978). Additionally, "[t]his Court employs a deferential standard of review when reviewing a decision from the Commission and will affirm the Commission's decision if it is supported by substantial evidence." S.C. Energy Users Comm. v. SCE&G, 410 S.C. 348, 353, 764 S.E.2d 913, 915 (2014) (quoting S.C. Energy Users Comm. v. Pub. Serv. Comm'n, 388 S.C. 486, 490, 697 S.E.2d 587, 589-90 (2010)). This Court is without authority to set aside an agency's judgment on a factual issue where there is substantial evidence of record to support the agency's decision. Hamm v. S.C. Pub. Serv. Comm'n, 294 S.C. 320, 323, 364 S.E.2d 455, 456 (1988) (citation omitted).

"[T]he party challenging a PSC order must establish that (1) the PSC decision is not supported by substantial evidence and (2) the decision is clearly erroneous in light of the substantial evidence in the record." Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C., 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) (citations omitted). "Because the Commission's findings are presumptively correct, the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." S.C. Energy Users Comm. v. S.C. Pub. Service Comm'n, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). "In applying a substantial evidence test, an appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, unless its findings or conclusions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Friends of the Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. 360, 366, 692, S.E.2d 910, 913 (2010) (citations omitted).

"A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. S.C. State Bd. of Dentistry, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985). "An abuse of discretion occurs where the trial court is controlled by an error of law or where the Court's order is based on factual conclusions without evidentiary support." Smith v. S.C. Ret. Sys., 336 S.C. 505, 523, 520 S.E.2d 339, 349 (Ct. App. 1999).

SUMMARY OF ARGUMENT

The Companies seek to impose upon their South Carolina customers over $800 million for expenses that are attributable to a law passed by the North Carolina General Assembly in response to the Companies' criminal negligence. While obligated to comply with CAMA in connection with remediation measures in North Carolina, the Companies are not entitled to make their South Carolina customers pay for those costs, and to do so would be to impose rates that are unjust and unreasonable. The Companies have conceded that certain CAMA costs should be directly assigned to the Companies' North Carolina customers, and the Companies' South Carolina ratepayers had no voice in the North Carolina legislature's decision to pass CAMA and no involvement in the

Companies' actions that led to CAMA. To require the South Carolina Public Service Commission to adhere to law adopted by the North Carolina General Assembly or decisions of the North Carolina Utilities Commission in determining whether to allow the recovery of CAMA-specific costs from the Companies' South Carolina customers would dramatically undermine the independence of the Commission and its statutory obligation to set just and reasonable rates for ratepayers in this State.

The Commission has historically utilized the discretion given to it by the South Carolina General Assembly to prevent the Companies from charging their South Carolina customers unjust or unreasonable rates. In exercising its discretion, the Commission has consistently applied sound ratemaking principles by reviewing utility expenses and directly assigning costs to the cost causers. This situation is no different.

In this case, the Commission justifiably relied upon substantial evidence in the record and prevented excessive costs that were directly caused by a law, which was the result of the Companies' mismanagement and criminal wrongdoing, from being assigned to the Companies' South Carolina customers. It is not the obligation of the Companies' South Carolina customers to pay the bill created by the North Carolina General Assembly and clean up the mess created by the Companies' mismanagement of North Carolina properties, when those expenses do not provide any benefit to the South Carolina customers. However, the Commission did allow the Companies to recover costs they would have incurred under the CCR Rule, as it acknowledged the Companies would have incurred these costs even if CAMA did not exist. DEP and DEC are entitled to no more. The Commission's decision is just and reasonable, founded both in precedent and sound policy, and supported by the substantial evidence on the whole record.

No unconstitutional taking occurred in the disallowance of CAMA-specific expenses because the Commission's Orders do not result in the deprivation of any property interest. In the context of setting rates for a regulated utility, a property right does not arise unless and until there is a determination the cost sought to be included in the rates is just and reasonable. Because the Companies had no entitlement to recover their North Carolina Coal Ash Disposal costs from their South Carolina customers, no unconstitutional taking occurred. Moreover, the determination of a taking in this context is a fact-intensive inquiry, and the Companies failed to present evidence to prove that a disallowance of CAMA-specific costs results in confiscatory rates.

Based upon a thorough and well-reasoned analysis, ORS's expert witness determined the amount of costs the Companies incurred that were attributable solely to CAMA and that exceeded what would have been incurred in compliance with the CCR Rule. After conducting a detailed review of all evidence presented, the Commission issued Orders Nos. 2019-323 and 2019-341, appropriately setting just and reasonable rates and prohibiting the Companies from recovering unreasonable costs from their South Carolina customers. These Orders were entirely fair and appropriate, and do not come even close to being arbitrary, capricious, or clearly erroneous. Accordingly, they must stand.

The Commission's decision to disallow CAMA-specific costs does not constitute a facial violation of the dormant Commerce Clause under the United States Constitution. As a threshold matter, this issue was not timely raised by the Companies, and therefore is not preserved for appeal. Further, the argument has no merit. The United States Supreme Court recognizes the powerful state interest in regulating sales of electricity to domestic consumers buying at retail. The Commission's decision does not constitute economic protectionism, but rather is a reasonable and logical exercise of its legislatively granted authority to determine just and reasonable rates.

The Commission appropriately disallowed the Companies' request to recover coal ash litigation expenses, because the Companies failed to provide sufficient documentation in response to the challenge from the ORS. Contrary to the Companies' unwarranted claim that the ORS sandbagged them on this issue, the ORS requested such information, which the Companies failed to provide. In their brief, the Companies incorrectly assert that ORS did not raise this issue until its surrebuttal testimony, which was filed "during the hearings." While ORS is unsure of the origination of this statement, the record clearly shows it to be baseless. To the contrary, the record shows that the Companies responded to the issue in their rebuttal testimonies and that the Commission even permitted the Companies, at the late hour of the final day of the DEP hearings and as a late-filed exhibit in DEC, to provide additional support for their litigation expenses. However, even with the leniency provided by the Commission on this matter, the Companies were unable to adequately demonstrate whether and to what extent these fees were incurred apart from the Companies' criminal proceedings, and thus that recovery of these legal fees from the Companies' customers was just and reasonable.

Finally, the Commission's decision to allow recovery of, but not a return on, deferred operating expenses is also just and reasonable. The Companies provide no authority that supports the position that they are entitled to both recovery of deferred operating costs and a Weighted Average Cost of Capital ("WACC") return on those deferred costs. The treatment of deferrals has always been a matter within the discretion of the Commission, which has a duty to balance the needs of the utility and the utility's customers such that the public is served without harming the financial well-being of the utility. The Commission struck a fair balance here by allowing full recovery of the deferred costs (with the exception of the disallowed CAMA-specific costs) as well as a WACC return on capital-related costs but not on operating costs. Moreover, the evidence makes clear that the Companies could not reasonably have expected to be guaranteed the ability to receive a return on their deferred operating expenses. Accordingly, the Commission acted within the scope of its statutory authority in exercising its discretion to deny the Companies' requests to earn a return on certain deferred costs or include the balance of these deferrals in rate base.

The Commission is the expert designated to set policy determinations regarding the Companies' rates and sits as the trier of fact. The facts in the record make clear that the Commission's Orders are supported by the substantial evidence on the whole record and are not arbitrary, capricious, or clearly erroneous. Accordingly, the Commission operated within the parameters set by the South Carolina General Assembly and this Court, and its Orders should be upheld.

ARGUMENT

According to the South Carolina Code, "[e]very rate made, demanded or received by any electrical utility...shall be just and reasonable." S.C. Code Ann. § 58-27-810. The Commission sets just and reasonable rates by balancing the interests of ratepayers with the right of the utility to earn a fair return. S.C. Cable Television Ass'n v. Pub. Serv. Comm'n of S.C., 313 S.C. 48, 51, 437 S.E.2d 38, 39 (1993) (citations omitted). "In fulfilling its obligation to balance the interests of a public utility and the often-competing interests of the intervenors in a complex rate proceeding, the Commission is empowered to utilize its discretion and expertise in setting 'just and reasonable rates.'" Parker v. S.C. Pub. Serv. Comm'n, 281 S.C. 22, 24, 314 S.E.2d 148, 149 (1984) (citations omitted). The "[r]easonableness of rates should be determined by an evaluation of the utility's holdings and obligations and the return which the utility realizes from the rates...The focus is upon the financial condition of the utility, particularly whether the return realized from the rates is so low as to be confiscatory to the utility or so high as to be unduly burdensome to the utility's customers." Mims v. Edgefield Cnty. Water & Sewer Auth., 278 S.C. 554, 556, 299 S.E.2d 484, 486 (1983) (emphasis added) (citations omitted).

When discussing the returns to which a public utility is entitled the opportunity to earn, parties frequently cite Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602-03 (1944) ("Hope") and Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va., 262 U.S. 679, 692-93 (1923) ("Bluefield"). In Bluefield, the United States Supreme Court outlined the constitutional standards for determining an appropriate rate of return:

> A public utility is entitled to such rates as will permit it to earn a return upon the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, *under efficient and economical management*, to maintain and support its credit, and enable it to raise the money necessary for the proper discharge of its public duties.

So. Bell Tel & Tel Co., 270 S.C. at 595, 244 S.E.2d at 281 (quoting Bluefield, 262 U.S. at 692) (emphasis added).

In Hope, the United States Supreme Court reaffirmed these principles, holding:

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.... By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Hope, 320 U.S. at 603.

In summary, Hope and Bluefield hold that (1) a regulated public utility is entitled to rates that allow it the opportunity to earn a return on its invested capital that is equal to that being made at the same time and in the same general part of the country of other investments in business undertakings with similar risks and uncertainties, (2) the return should be such as to assure confidence in the financial soundness of the utility and adequate, under efficient and economic management, to maintain and support its credit and enable it to raise money necessary for proper discharge of its duties, and (3) the utility has no right to the kinds of profits that may be realized in highly profitable enterprises.

It is through the lens outlined above that this case must be viewed. The Commission may not arbitrarily veer from its own established precedent in making decisions regarding costs to be passed onto the Companies' South Carolina customers. The Commission has an obligation to balance the competing interests, to set rates that are just and reasonable to both the utility and its customers. That is exactly what it did here. The Commission justifiably denied the Companies' request to burden their South Carolina customers with the costs resultant solely from CAMA, with litigation expenses the Companies failed to document were properly included in their rates, and with a return on deferred operating expenses. This Court should affirm.

I. The Commission Appropriately Determined that the Companies Were Not Entitled to Recover Certain Coal Ash Costs from Their South Carolina Customers When Those Costs Resulted from a North Carolina Law from Which the Companies' South Carolina Customers Receive No Benefit and into Which They Had No Political Input.

Neither the Commission, nor the South Carolina General Assembly, nor the South Carolina ratepayers, had any meaningful input into the enactment of CAMA. If the costs incurred by the Companies solely because of that legislation were to be passed onto the Companies' South Carolina customers, the Companies would be permitted to unreasonably inflate their rates to cover costs incurred to comply with a law that North Carolina passed in direct response to the

Companies' negligence and that provides no benefit to South Carolina ratepayers. That law imposes standards over and above what the EPA has determined to be sufficient. While the Commission has no authority to dictate to the Companies what they may recover from their customers in other jurisdictions, the Commission appropriately protected the Companies' customers in South Carolina from unreasonable and excessive costs resulting from the Companies' own negligence. Its Orders 2019-323 and 2019-341 should be upheld. The utility may recover its reasonable and prudently incurred costs only when it demonstrates that it made every reasonable effort to minimize costs. "The ultimate burden of showing every reasonable effort to minimize . . . costs remains on the utility." Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 110, 708 S.E.2d 755, 762-63 (2011) (emphasis added) (quoting Hamm v. S.C. Pub. Serv. Comm'n, 309 S.C. 282, 286-87, 422 S.E.2d 110, 112-13 (1992)).

While no party asserts the Companies can disregard the laws enacted by the North Carolina General Assembly, the fact that the North Carolina General Assembly passed CAMA does not entitle the Companies to impose the costs that were required by CAMA, and CAMA alone, upon their South Carolina customers. To allow otherwise would give the North Carolina General Assembly sway over the rates ordered by the Commission. Also, while the Companies' South Carolina customers have benefited from the electricity generated by the Companies' coal fired plants, the Companies' South Carolina customers have not benefited in any meaningful or quantifiable manner from the CAMA requirements that exceed the CCR Rule. In other words, the South Carolina customers have benefitted from the lower cost of electricity generated by the Companies' coal plants but have not benefitted from the cost of remediation required by CAMA as a result of the Companies' criminal wrongdoing. Had the Companies carried out the inexpensive preventive and precautionary efforts their own engineers recommended, the South

Carolina customers would have received the same benefit "from the electricity" (Companies' Brief p. 21) without having to pay for costs the Companies incurred as the result of their mismanagement. The Commission acted properly in refusing to impose such costs on the South Carolina ratepayers in this proceeding.

The record contains ample evidence, and the Orders demonstrate that the Commission relied upon the same, indicating that the costs imposed solely by CAMA were unreasonable for the Companies' South Carolina customers and the direct result of the Companies' unreasonable (indeed criminal) actions. The CCR Rule, which "effectively address[es] . . . the human health and environmental risks associated with the disposal of CCRs[,]" sets the federal standard for reasonable expenses incurred to effectively remediate coal ash. 80 Fed. Reg. § 21411. CAMA increases costs over those that would be incurred if the Companies were required to comply only with the CCR Rule. The evidence of record demonstrates that CAMA was a direct result of the Companies' negligence. Contesting parties, including ORS, presented evidence that overcame the Companies' initial presumption of reasonableness, and the Companies failed to meet their burden of showing every reasonable effort was undertaken to minimize costs. Indeed, the Companies cannot make this showing in the face of their guilty pleas demonstrating that their own misconduct led to costs that could easily and inexpensively have been avoided with proper management.

Moreover, the Commission allowed recovery of the CAMA costs that the Companies would have incurred in complying with the CCR Rule. ORS witness Dan Wittliff presented a thorough and well-reasoned analysis, on which the Commission relied in making its determination of what costs were incurred solely as a result of requirements imposed by CAMA and in excess of what would have been incurred to comply with the CCR Rule. The Commission acted according to its statutory obligation by allowing recovery of the costs the Companies would have incurred had they only been required to comply with the CCR Rule and disallowing from recovery costs incurred solely to comply with CAMA—costs that were unreasonable for the Companies' South Carolina customers. This was a fair balance of the competing interests. For these reasons, the Court should uphold the Orders that are before it.

A. The Companies Have No Entitlement to Recover CAMA Coal Ash Costs from Their South Carolina Customers when Doing So Contravenes Cost Causation Principles.

The Companies assert that because electricity generating units, which produce coal ash, span North and South Carolina, they are entitled to recover from their South Carolina customers costs associated with CAMA. (See Companies' Brief p. 20.) This is a red herring argument that conflates the benefits associated with the production of electricity, of which the Companies' South Carolina customers have undoubtedly enjoyed, with alleged benefits of environmental remediation associated with CAMA-specific requirements, from which the Commission correctly concluded South Carolina customers derive no benefit. Commission precedent and positions taken by the Companies in this proceeding support the Commission's decision that the Companies are not entitled to recover certain CAMA-specific costs from their South Carolina customers.

The Commission has historically allocated utility expenses based upon the principle of cost causation. A cost causation allocation puts the cost responsibility for expenses on the customer class that caused the expenses to be incurred. (See R. p. 840, lines 8-12; R. p. 5083, lines 15-20). Traditionally, the Commission has fairly and reasonably utilized cost causation principles in determining costs that the Companies' South Carolina customers should bear. To apply a simple percentage to all expenses on the front end, without a proper causation analysis, would ignore historical precedent and the intricacies involved in allocating costs, and would be grossly unfair to the ratepayers – particularly when, as here, the Companies ask for costs incurred because of legislation enacted in North Carolina, which resulted from the Companies' own criminal mismanagement and which provides no quantifiable benefit to South Carolina customers. Accordingly, the Commission has justifiably isolated costs that are directly attributable to one jurisdiction in making a fair and reasonable determination of expenditures recoverable from the Companies' South Carolina customers.

ORS witness Michael Seaman-Huynh testified that "[i]t is a common practice for utilities operating in multiple jurisdictions to assign the costs related to certain accounts directly to one jurisdiction" and that "[t]hese costs are often derived from laws and regulations that are specific to that jurisdiction." (R. p. 843, lines 13-16; R. p. 5086, lines 1-4). Additionally, "it is appropriate for the total costs associated with implementation and compliance with the laws and regulations of a particular jurisdiction be allocated completely to that jurisdiction while holding the customers of other jurisdictions harmless." (R. p. 843, lines 17-20; R. p. 5086, lines 5-8).

Similarly, Company witnesses testified that in conducting a cost of service study one should "[allocate] or directly [assign] to the proper jurisdiction and customer class based on the manner in which the costs are incurred (*i.e.* based on cost causation principles)." (R. p. 594, lines 5-8; R. p. 5005, lines 5-8). According to witness Janice Hager, who testified for the Companies, "[u]sing the principle of cost causation, revenues, expenses, and rate --rate base costs are assigned to the specific jurisdictions and customer classes that caused such costs to be incurred." (R. p. 590, lines 8-18; R. p. 5001, lines 4-8).[8] Ms. Hager unequivocally stated, "[c]ost components identified as having a direct relationship to a jurisdiction or customer class are directly assigned to that jurisdiction or class before any allocations occur." (R. p. 595, lines 21-23; R. p. 5006, lines 21-23). This testimony from the Companies' witness is consistent with established law: "all approved

[8] Ms. Hager also testified that "[t]he purpose of a cost of service study is to align the total costs incurred by [the Company] in the test period, with the jurisdiction and customer classes responsible for the costs." (R. p. 591, lines 17-19; R. p. 5002, lines 17-19).

rates [must] reflect to some degree the costs actually caused by the customer who must pay them." Pac. Gas & Elec. Co. v. FERC, 373 F.3d 1315, 1320–21 (D.C. Cir. 2004); Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 708 (D.C. Cir. 2000); KN Energy, Inc. v. FERC, 968 F.2d 1295, 1300 (D.C. Cir. 1992).

There are instances in this proceeding in which the Companies directly assigned costs to the specific jurisdiction that caused the costs. For example, the Companies cited a specific South Carolina statute in making a direct assignment, which was described by DEP witness Laura D. Bateman in discussing the adjustment for allocation of PUC License Tax Expense:

> This adjustment was added to correct an allocation of the South Carolina license fee imposed on South Carolina property and gross receipts under South Carolina Code §12-20-100 in the per books cost of service. In the original filing, these taxes were inadvertently allocated to all jurisdictions. This pro forma updates the allocation to direct assign the portions of the tax based on gross receipts and distribution property to South Carolina.

(R. p. 418, lines 11-17).

Direct allocations made by the Companies to their North Carolina customers even included certain expenses incurred due to CAMA. According to the Companies' witness, Jon F. Kerin, the Companies "decided to absorb the share of [certain CAMA] costs that the North Carolina Utilities Commission ordered should be allocated to South Carolina." (R. p. 731, lines 9-11; R. p. 4528, lines 7-9). Kerin testified that the Company is not seeking recovery of costs associated with the provision of drinking water to North Carolina residents, including the provision of bottled water and permanent drinking water supplies, "*e.g.*, connection to public water supply or filtration systems." (R. p. 731, lines 5-9; R. p. 4528, lines 3-7). Mr. Kerin further testified the costs to comply with CAMA and the CCR Rule are somewhat duplicative but there is a portion of the costs that "the Company has determined are specific to CAMA, unique to North Carolina and appropriate for direct assignment to North Carolina." (R. p. 389, line 22-p. 390, line 2; R. p. 4147, lines 13-17). Additionally, the Companies did not seek to recover from their South Carolina customers costs that were incurred to comply with other North Carolina laws, including the North Carolina Clean Smokestacks Act, North Carolina Renewable Portfolio Standards, and the Competitive Energy Solutions for North Carolina laws. (R. p. 866, lines 1-5; R. p. 5108, lines 17-21). In fact, when discussing why DEC believed implementation costs stemming from North Carolina's Competitive Procurement of Renewable Energy ("CPRE") Rider should be allocated solely to DEC's North Carolina customers, a witness for DEC recently testified as follows:

> ...the CPRE implementation costs are caused solely by the Company's obligation to comply with N.C. Gen. Stat. § 62-110.8 and Commission Rule R8-71. Stated differently, the implementation costs would not have been incurred "but for" the requirements of N.C. Gen. Stat. § 62-110.8 and Commission Rule R8-71...Therefore, <u>the cost causation principle supports the Company's proposed allocation of CPRE implementation costs to North Carolina retail customers</u>.[9]

This evidence highlights the logically inconsistent positions the Companies have taken in these proceedings. The Companies would have the Commission arbitrarily recognize certain CAMA costs be borne by the Companies' North Carolina customers, while ordering a split allocation for the remainder with some to be borne by the Companies' South Carolina customers and the remainder to be presumably borne by the Companies' North Carolina customers, without any reasoned basis.

In their brief, the Companies attempt to distinguish previous direct allocations associated with costs incurred to comply with specific North Carolina laws from the present situation. (Companies' Brief pp. 27-28). Companies allege the laws listed above are different from CAMA

[9] Application of Duke Energy Carolinas, LLC Pursuant to G.S. 62-110.8 and Commission Rule R8-71 for Approval of CPRE Compliance Report and CPRE Cost Recovery Rider, Docket No. E-7, Sub 1231, Rebuttal Testimony of Bryan L. Sykes, p. 5, ll. 1-18, May 28, 2020 (emphasis added).

because they represent policy decisions by lawmakers that imposed additional, incremental costs on utilities. (Companies' Brief p. 27). But this is exactly what CAMA does.

Additionally, the Companies assert CAMA is distinguishable from the other statutes where direct allocations occurred because "the legislative bodies included provisions allowing for the recovery of the incremental costs directly from the customers in their respective states on a prospective basis." (Companies' Brief p. 27). While this statement may be true, the prospective nature of those statutes is irrelevant when analyzing cost causation and making appropriate direct allocations. The Companies offer no support for the contention that, or explanation as to how, the prospective nature of a statute impacts the South Carolina Public Service Commission's cost causation analysis, or to reconcile their position with the fact that the Commission directly allocates expenses without regard to whether the expenses were incurred on a prospective basis. Additionally, the implication that the statutes require expenses caused by those statutes be allocated directly to the cost causing jurisdiction is incorrect. (Companies' Brief p. 27). Rather, the statutes give discretionary authority to the applicable regulatory body for the direct allocation of expenses. It is only by the Commission consistently acting according to its statutory duty in setting just and reasonable rates through its orders that the Companies have directly allocated costs to the cost causing jurisdiction.

The similarities between CAMA and the North Carolina Clean Smokestacks Act are perhaps most obvious. The North Carolina Clean Smokestacks Act sets caps on total annual emission of certain pollutants released from coal fired power plants for DEP and DEC. Richard N.L. Andrews, <u>State Environmental Policy Innovations: North Carolina's Clean Smokestacks Act,</u> 43 Envtl. L. 881, 883 (2013); <u>N.C. Gen. Stat. § 143–215.107D</u>. Both statutes are based upon policy directives implemented by the North Carolina General Assembly and both result in increased environmental compliance costs. Additionally, both deal with coal generation plants that have produced electricity for the Companies' North Carolina and South Carolina customers. However, while the Companies have directly allocated all costs associated with the North Carolina Clean Smokestacks Act to their North Carolina customers, the Companies only allocated a portion of the expenses resulting from CAMA to their North Carolina customers. The Companies have not adequately explained why they are taking inconsistent positions because they cannot. Logic, policy, and past precedent all dictate that the costs caused by CAMA in excess of those that would have been caused by the CCR Rule should not be allocated to the Companies' South Carolina customers.

Contrary to the Companies' argument on appeal (Companies' Brief p. at 32-35), the record unmistakably supports the Commission's decision that CAMA imposes costs in excess of those that would otherwise be caused by the CCR Rule. (See, e.g., R. pp. 904-908; R. p. 881, lines 14-16; R. pp. 4775-4778; R. p. 4854, lines 19-23; see also infra at 40-46). The evidence of record, case law, and Commission precedent dictate that the costs attributable solely to CAMA should be borne by the cost causers. Accordingly, while the Commission is not beholden to *stare decisis*,[10] these CAMA-specific costs should be directly allocated to the Companies' North Carolina customers, and substantial evidence in the record supports the Commission's decision to prohibit the allocation of these costs to the Companies' South Carolina customers. In these proceedings, the Commission appropriately exercised its latitude to determine appropriate rates by excluding

[10] The Commission is not bound by the principle of *stare decisis,* but it cannot act arbitrarily in failing to follow established precedent. See 330 Concord St. Neighborhood Ass'n v. Campsen, 309 S. C. 514, 517–18, 424 S.E.2d 538, 539–40 (Ct. App. 1992).

costs required only by CAMA in excess of the CCR Rule.[11]

Additionally, in making its determination, the Commission relied, in part, upon South Carolina Constitution Article X, § 5 which states, "[n]o tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled…," and S.C Constitution Article IX, § 1 which states, "[t]he General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately-owned utilities serving the public as and to the extent required by the public interest." (R. pp. 48-50). Applying these provisions of the South Carolina Constitution, the Commission reasoned:

> The North Carolina General Assembly has the authority to create the laws that govern the business conducted in North Carolina; however, to subject South Carolina DEP customers to North Carolina laws which are neither necessary for the provision of power nor which confer benefits to South Carolina ratepayers would be inappropriate. As a result, this Commission will not permit DEP to pass on increased expenses incurred as a result of North Carolina's CAMA.

(R. p. 50).

This position is eminently fair and reasonable. The Commission's Orders should be upheld.

1) The Companies' South Carolina Customers Receive No Quantifiable Benefit from North Carolina's CAMA Legislation.

While the evidence in this record demonstrates that the Commission traditionally implements cost causation principles by directly allocating costs to the specific jurisdictions and customer classes that caused them,[12] the Commission has, at times, considered not only the cost

[11] The Commission has wide latitude in determining appropriate rate-setting and there is no abuse of discretion where substantial evidence supports a finding of a just and reasonable rate. Kiawah Prop. Owners Grp., 357 S.C. at 241 n. 5.

[12] See R. p. 590, lines 8-18; R. p. 595, lines 21-23; R. p. 5001, lines 4-8; R. p. 5006, lines 21-23.

causer but also the beneficiaries of service.[13] However, despite the Companies' assertions, the evidence of record established that their South Carolina customers receive no meaningful or quantifiable benefit from CAMA.[14]

In a case closely analogous to the instant one, the United States Court of Appeals for the District of Columbia recently affirmed a decision to allocate costs to a single jurisdiction on the ground that the jurisdiction was the sole beneficiary of the costs. In Northern Virginia Electric Cooperative, Inc. v. Federal Energy Regulatory Commission, 945 F.3d 1201 (D.C. Cir. 2019), the Federal Energy Regulatory Commission ("FERC") determined that Dominion Energy's Virginia customers, but not its North Carolina customers, should bear the costs of placing new transmission wires underground to comply with requirements placed into effect by Virginia law. Id. The costs to underground transmission wires significantly exceeds the cost of overhead wiring. Id. The court in Northern Virginia Electric Cooperative acknowledged that FERC has long adhered to the cost causation principle, under which a utility should assign costs to those customers who caused them or benefit from them. Id. at 1207.[15] However, in analyzing the evidence presented, FERC concluded that only Dominion's Virginia customers benefited from the incremental costs of undergrounding the three projects and only Virginia customers should bear those costs. Id. FERC recognized that this position maintained consistency with the cost causation principle. Id. While

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[13] See Docket No. 1986-188-E, Commission Order No. 86-1116, p. 94 (stating the Commission has "traditionally exercised its statutory responsibility to provide for 'just and reasonable' rates, pursuant to S.C. Code Ann., § 58–27–810 (1976) by the recognition and implementation of the objective to provide electric utilities a fair opportunity to earn a reasonable return which produces the allowed revenue requirement in a manner which *equitably apportions the revenue responsibility among the beneficiaries* of the utility's service.") (emphasis added)).

[14] See Companies' Brief p. 23; see also R. p. 943, line 21-p. 944, line 13; R. p. 4807, lines 3-15.

[15] In the case before this Court, the evidence of record indicates that the principles of cost causation require the assignment of costs to the party that caused the costs to occur. (See R. p. 590, lines 8-18; R. p. 5001, lines 4-8). However, consideration of who the costs benefit (and do not benefit) also supports the Commission's Orders.

the benefits of conventional grid enhancement are shared throughout the grid, Virginians uniquely caused and benefited from the undergrounding. Id. FERC also rested on the insistence of the Virginia legislature that Dominion underground all three projects. Id. It noted that the costs were "a direct result of legislation [adopted by the Commonwealth of Virginia] ... intended to benefit citizens of the Commonwealth of Virginia." Id.

In response to Dominion's contentions that FERC lacked affirmative evidence that North Carolina customers did not benefit from the undergrounding, the District of Columbia Court of Appeals rejected the argument on the basis that it ignored:

> (1) the mountain of evidence that Virginians clamored for the undergrounding; (2) the Virginia legislature's apparent intent to act for the benefit of its citizens; (3) the absence of any evidence that North Carolina customers caused or benefited from the undergrounding.

Id. Accordingly, the court held that there was substantial evidence supporting the decision that Virginia customers benefited from the undergrounding but North Carolina customers did not, and, as a result, only the Virginia customers should bear those costs. Id. at 1208.

The present situation is very similar to that before the District of Columbia Court of Appeals. CAMA was passed by the North Carolina General Assembly in response to the Companies' negligence and for the purpose of providing benefits to the citizens of North Carolina.[16] Only the Companies' North Carolina customers receive any quantifiable benefit from CAMA's requirements in excess of the CCR Rule. Contrary to assertions in the Companies' brief, no ORS witness "admitted" that CAMA directly caused any quantifiable benefit to South Carolina customers.[17] To the contrary, when asked whether South Carolina customers benefit more from

[16] It is abundantly clear that the North Carolina General Assembly in passing CAMA was concerned about the "protection of North Carolina surface water and ground water resources for their best usage." (R. p. 944, lines 3-7).
[17] See Companies' Brief p. 23.

CAMA than they would have under federal CCR requirements, ORS witness Dan Wittliff answered: "No. . . . CAMA includes protections above and beyond what is required in the federal CCR Rule and these protections accrue primarily to the benefit of North Carolina residents with an unquantifiable, but minimal, benefit to South Carolina residents…." (R. p. 943, line 21-p. 944, line 13; R. p. 4807, lines 3-15). The only benefits CAMA could impart to the Companies' South Carolina customers are unquantifiable and purely speculative.

"As a general rule, appellate courts require some degree of quantified and individualized cost-benefit analysis in order for a cost-allocation mechanism to satisfy the cost-causation principle."[18] In this case, the evidence established that any purported benefits that the Companies' South Carolina customers might realize from CAMA would be "unquantifiable" and "minimal." (See R. p. 943, line 21-p. 944, line 13). There is no evidence in the proceeding that would allow the Commission the ability to make even a rough estimate of the purported benefits accrued to the Companies' South Carolina customers. To attempt to do so would be entirely conjecture. As a result, any alleged benefit is speculative and unsupported by the record. The Commission must not base a decision upon surmise, conjecture or speculation. See Daufuskie Island Utility Co. v. S.C. Office of Regulatory Staff, 420 S.C. 305, 317, 803 S.E.2d 280, 286 (2017).

The Commission, which is the designated expert to make policy determinations and the trier of fact, found in the absence of any proof or basis other than rank speculation, that CAMA confers no benefits upon South Carolinians, and stated, "[w]e further find it would not be just and reasonable for DEP's South Carolina customers to pay costs incurred solely as a result of a North Carolina law, for which no benefit is received to South Carolina's ratepayers." (emphasis added)

[18] Gabe Maser, Note, It's Electric, But FERC's Cost-Causation Boogie-Woogie Fails to Justify Socialized Costs for Renewable Transmission, 100 Geo. L.J. 1829, 1836 (citing Ill. Commerce Comm'n v. FERC, 576 F.3d 470, at 475-76 (7th Cir. 2009)).

(Order No. 2019-341, R. p. 104).[19] Similar to Dominion in Northern Virginia Electric Cooperative, the Companies failed to meet their burden, in response to the challenge from the ORS, of showing a benefit to South Carolina customers from CAMA-specific costs. In making its determination, the Commission relied upon substantial evidence in the record and its Orders are fair and reasonable. They do not come even close to the standard required for reversal: arbitrary or capricious.

The Companies repeatedly conflate the benefit conferred upon the Companies' customers from the production of electricity at coal fired power plants with a purported benefit conferred upon its customers from CAMA. It is true that the Companies' South Carolina customers have received electricity from coal fired power plants located in North Carolina. For that very reason, the Commission allowed the Companies to recover reasonable costs incurred at those plants that equal what would have been required to comply with the CCR Rule. However, there was no proof of any benefit to South Carolina ratepayers from the remediation that CAMA required in excess of the CCR Rule. Thus, the Commission correctly concluded South Carolina customers did not benefit from CAMA, and as such, it would be unjust and unreasonable for them to pay CAMA-specific costs.

2) The Risks Inherent with Doing Business in More than One State Do Not Entitle the Companies to Saddle Their South Carolina Customers with Costs Required Only by North Carolina Law.

The Companies' brief repeatedly asserts that because the Companies cannot ignore North Carolina's laws and because their plants in North Carolina produced electricity consumed in South Carolina, the Companies' South Carolina customers must be held subject to the actions of the

[19] See also Order No. 2019-323, R. p. 3911 ("To subject South Carolina DEC customers to North Carolina laws which are neither necessary for the provision of power nor which confer benefits to South Carolina ratepayers would be inappropriate.").

North Carolina General Assembly and the Commission bound by the decisions of the North Carolina Utilities Commission. (See Companies' Brief, pp. 25, 26). In essence, the Companies seek to require their South Carolina customers to subsidize costs that result from legislation on which they had no political input and that provide no benefit to them. In contrast, the Companies' North Carolina customers did have a voice in that legislation through their elected representatives, and they are the beneficiaries of the legislation. Those costs, therefore, should be borne by their North Carolina customers. The Companies' argument completely sidesteps the fact that both South Carolina and North Carolina impose obligations upon the entities that conduct business in both states and that are unique to operations in the individual states.

The North Carolina Supreme Court has recognized that the risk of inconsistent determinations in two different jurisdictions regarding what costs a utility may recover is "a necessary consequence of doing business in more than one state." State of North Carolina ex rel. Utils. Comm'n v. N.C. Power, 450 S.E.2d 896, 902 (N.C. 1994). In that case, the North Carolina Supreme Court affirmed the North Carolina Utilities Commission's disallowance of $1.39 million in expenses that an arbitrator for the Virginia State Corporation Commission had determined North Carolina Power should pay a small power production facility. The North Carolina Utilities Commission determined a different measure should have been used to determine what amount should have been paid to the small power production facility and would be reasonable to include in the utility's rates. Id. at 901-02.

Similarly, in this case, the Commission is not obligated to allow the Companies to include in rates CAMA-specific costs, solely because the North Carolina General Assembly enacted CAMA and the North Carolina Utilities Commission allowed the Companies to recover CAMA-specific costs from their North Carolina customers. Neither of those facts is a valid ground to require the Commission to defer to those governmental entities or to impose the burden of those costs on South Carolina ratepayers.

3) The Commission's Orders Do Not Result in an Unconstitutional Taking.

The Companies allege that the Commission's Order results in an unconstitutional taking;[20] however, no unconstitutional taking occurred because no property interest existed that the Orders took. As explained by the North Carolina Supreme Court:

> Invocation of constitutional protection against takings without just compensation or without due process requires a property interest on the part of the person seeking such protection. Where there is no property interest, there is no entitlement to constitutional protection. To have a property interest that is subject to procedural due process protection, the individual must be entitled to a benefit created and defined by a source independent of the Constitution, such as state law.

State of North Carolina ex rel. Utils. Comm'n v. Carolina Utility Customers Ass'n, 446 S.E.2d 332, 344 (N.C. 1994) (emphasis added). Likewise, this Court has stated that "[b]efore determining whether a taking has occurred, a court must first determine, what precisely, is the property at issue." Dunes West Golf Club v. Mount Pleasant, 401 S.C. 280, 306, 737 S.E.2d 601, 615 (2013).

The Companies' brief presumes that the Companies were entitled and had the right to recover from their South Carolina customers CAMA-specific costs, which of course is the primary issue in this proceeding. The Fifth Amendment to the United States Constitution provides that "private property shall not be taken for public use, without just compensation." U.S. Const. amend. V.[21] However these protections arise only where a property right exists. In the context of setting rates for a regulated utility, a property right does not arise unless and until there is a determination the cost sought to be included in the rates is just and reasonable. Because the Company had no

[20] See Companies' Brief pp. 24, 25.

[21] The Fifth Amendment right to protection against takings is implicit in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and applicable to the states. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) .

entitlement to recover its North Carolina Coal Ash Disposal costs from their South Carolina customers, no unconstitutional taking occurred.

It is within the Commission's statutorily delegated power to determine the amount of expenses that will be charged to ratepayers. Seabrook Island Prop. Owners Ass'n v. S.C. Pub. Serv. Comm'n, 303 S.C. 493, 401 S.E.2d 672 (1991). Furthermore, the Commission is considered the expert designated by the legislature to make policy determinations regarding utility rates. Daufuskie Island Util. Co., 420 S.C. at 313-14, 803 S.E.2d at 284. The Commission followed its longstanding precedent of directly allocating costs to the cost causers, found South Carolinians received no benefit from CAMA, and appropriately refused to let the North Carolina General Assembly dictate what costs must be included in rates for South Carolinians. For all of the reasons above, it is clear the Companies have no entitlement to recover certain CAMA costs from their South Carolina customers and the Commission's Orders should be upheld.

Additionally, whether a taking has occurred in the utility rate-making context is inherently a fact-intensive inquiry and the Companies failed to present evidence indicating that the disallowance of CAMA-specific costs would result in confiscatory rates. The Constitution protects utilities from being limited to a charge for their property serving the public that is so "unjust" as to be confiscatory. Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989). Utility rates are too low if they are "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law." Fed. Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942). According to Hope, "[r]ates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid…." 320 U.S. at 605. Not only are the rates ordered by the Commission just and reasonable, the Companies failed to argue and provide evidence that disallowing recovery of CAMA costs would prevent the Companies from operating successfully, maintaining their financial integrity, attracting capital, and compensating their investors for the risk assumed. Accordingly, there is absolutely no proof that an unconstitutional taking has occurred, and the Commission's Orders should be upheld.

II. The Commission Appropriately Determined that Certain Coal Ash Expenses the Companies Sought to Impose Upon their South Carolina Customers Were Not Just and Reasonable Where the Expenses Exceed What the Federal Government Determined to be Sufficient and Were the Result of the Companies' Criminal Negligence that Caused a Catastrophic Environmental Disaster in North Carolina but Had Little to No Effect in South Carolina.

"[T]he fixing of 'just and reasonable' rates involves the balancing of the investor and the consumer interests . . . ." So. Bell Tel. & Tel. Co., 270 S.C. at 596-97, 244 S.E.2d at 281. The Companies are entitled to a presumption of reasonableness; however, the facts and evidence presented above and at the proceedings burst any presumption to which the Companies were entitled. After considering the evidence on the whole record, the Commission appropriately determined that the Companies did not meet their burden of showing that it would be just and reasonable to impose the costs incurred solely as a result of CAMA, and which would not have been incurred under the CCR Rule, on the Companies' South Carolina customers. As a result, the Commission's Orders should be upheld.

1) The Evidence and Analysis on Which the Commission Relied to Determine Just and Reasonable Rates is both Thorough and Credible.

ORS witness Dan Wittliff's analysis of the costs attributable solely to CAMA, on which the Commission relied, was both thorough and credible. Mr. Wittliff is a licensed professional engineer in South Carolina, Texas, and Tennessee and a board-certified environmental engineer with the American Academy of Environmental Engineers and Scientists, where he served as a trustee from 2010-2015. (R. p. 1106, lines 13-23; R. p. 4757, lines 1-23). He is also past president of the National Society of Professional Engineers, where he currently chairs the Committee on Policy and Advocacy. (R. p. 875, line 23-p. 876, line 4; R. p. 4758, lines 3-11). Mr. Wittliff has extensive experience working with other utilities and coal ash remediation. (R. p. 875, line 13-p. 877, line 17; R. p. 888, lines 7-19). In forming his conclusions in this proceeding, he conducted a thorough review of data provided by the Companies and his own personal site evaluations. (R. pp. 890-891; R. p. 4759, lines 4-16). Mr. Wittliff reviewed an extensive amount of data provided by the Companies over the span of two years in determining the sum of costs that were incurred and that exceed what the Companies would have spent under the CCR Rule. (R. p. 1039, line 20-p. 1040, line 5; R. p. 1036, line 18-p. 1037, line 8). In addition to DEC and DEP site visits, Wittliff utilized the cost and schedule data provided by the Companies through their filed exhibits and extensive discovery, including eleven rounds of interrogatories, as the basis of his analysis and foundation for his recommendations for allowances and disallowances. (R. p. 937, lines 16-18; R. p. 4802, lines 8-13).

Based on this wealth of information and data, Mr. Wittliff identified the following types of expenditures as being solely attributable to CAMA and not the CCR Rule: 1) expenditures for plants and impoundments not covered at all by the CCR Rule; 2) expenditures for closure and/or excavation options not required under the CCR Rule, but required under CAMA or North Carolina court decisions; and 3) expenditures for actions that would not have been required at this time under the CCR Rule but are subject to accelerated schedules under CAMA or other North Carolina state law.[22] (R. p. 914, lines 9-18; R. p. 4784, lines 3-10). Wittliff testified that prudently incurred

[22] Mr. Wittliff analyzed the impact to costs of both CAMA and the North Carolina Mountain Energy Act of 2015. The North Carolina Mountain Energy Act of 2015 required the construction of a gas-fired combined cycle replacement energy on DEP's Asheville Steam Station site, which,

expenditures for actions that are required by and fulfill the CCR Rule, which are equivalent to the requirements of the State of South Carolina, are fully recoverable, and conversely he identified and quantified the CAMA-specific costs in excess of that amount. (R. p. 914, lines 19-22; R. p. 4800, lines 7-14). Mr. Wittliff's results are reasonable, well-documented in the record, and are summarized in the tables included in the Statement of Facts.

The Companies' comparison between Mr. Wittliff's testimony before the North Carolina Utilities Commission and his testimony before the South Carolina Public Service Commission is comparing apples to oranges and hardly appropriate. According to Mr. Wittliff, "[i]n North Carolina, we were charged with determining the reasonableness and prudency of the actions taken by Duke up to the time that CAMA became law;" whereas, "[i]n South Carolina, the primary charge -- in fact, our primary mission from the very beginning [--] was to determine quantitatively what were the marginal increases in costs brought by CAMA and subsequent amendments, above and beyond what the federal CCR [R]ules require." (R. p. 1036, lines 11-23; R. p. 4750, lines 16-24). Further, in this proceeding Mr. Wittliff testified that he had an additional year's worth of data over what he had for the analysis he conducted in North Carolina. (R. p. 1037, lines 4-8; <u>see also</u> R. p. 4826, line 6-p. 4827, line 14).

The Commission made no factual errors in relying upon Mr. Wittliff and other evidence of record to form the basis of its disallowance of certain CAMA costs. According to the South Carolina Supreme Court, "[t]he Commission sits as the trier of facts, akin to a jury of experts." <u>Hamm</u>, 309 S.C. at 287, 422 S.E.2d at 113 (1992). While parties may present varying viewpoints, it is the Commission that tries the facts and bases its conclusion thereon. The Companies'

in part, prevented the cheaper cap-in-place method of coal ash disposal. (R. p. 906, lines 9-11; R. p. 923, line 20-p. 924, line 13).

contention that errors were made by Dan Wittliff are little more than a request for this Court to re-try the case, which is clearly not appropriate under the applicable standards of review. The argument also fails to connect some of the alleged "errors" from the record to the Commission's analysis contained in the Orders.[23] Other allegations only serve to muddy the issue and in fact do not impact Mr. Wittliff's cost analysis.[24] Moreover, while the Company generically alleges that Mr. Wittliff relied upon erroneous data in calculating a disallowance for every DEP site, it is clear that Mr. Wittliff relied upon his personal observations, his judgment as a professional, and data supplied by DEP. (See R. pp. 890-891). In determining the appropriate costs that correspond to what DEP spent as a result of compliance with CAMA and sought for recovery, Mr. Wittliff relied on responses from the Companies. (See R. pp. 1327-1336).

The evidence below details why certain CAMA costs are excessive for specific plants and illustrates why the Commission's acceptance of Mr. Wittliff's analysis is correct and supported by the record:

- DEP Asheville: CAMA designated the Asheville station as a "High Priority"[25] site and required an accelerated schedule for removal of all ash and the closure of the sites to be accelerated. (R. p. 906, lines 17-19). CAMA originally required

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[23] For instance, Appellants allege error with regard to Mr. Wittliff's analysis associated with Riverbend Steam Station and cite to the Commission's order but fail to tie the alleged error to any evidence presented at the hearing. (Companies' Brief p. 33).

[24] For instance, Appellants' allegation that error was committed by the Commission regarding Mr. Wittliff's testimony on the accelerated closure schedule of Asheville is misleading. As seen in Mr. Wittliff's testimony, he recognizes that the timing of compliance actions at Asheville was not impacted by CAMA; however, the extension of compliance neither impacts the fact that DEP expended an unreasonable sum excavating and shipping CCR offsite nor does it allow DEP to perform cap-in-place of its Asheville Plant coal ash ponds. (R. p. 913, lines 8-13; R. p. 923, lines 10-14).

[25] CAMA allows only "low risk" coal combustion residuals basins to be closed by cap-in-place, while the CCR Rule allows for cap-in-place closure for a wider range of impoundments. (R. p. 906, lines 1-3). Cap-in-place is a cheaper closure option than excavating and shipping off site. (See R. p. 924, lines 4-13).

closure by August 1, 2019, though Mr. Wittliff recognized that Asheville's CAMA compliance date was extended to 2022 to accommodate the construction of gas-fired combined cycle replacement energy on site in accordance with the North Carolina Mountain Energy Act of 2015. (R. p. 906, lines 8-12). Despite the fact that the compliance date was extended, 4.1 million tons of ash were beneficially reused as structural fill at the Asheville airport, and 233 thousand tons of CCR were hauled to the DEC Cliffside Landfill and 1.7 million tons were hauled from Asheville to a landfill in Homer, Georgia. (R. p. 906, lines 12-15). As a result of CAMA, CCR at Asheville was excavated and shipped by train and truck to an off-site landfill, and the resulting costs exceeded what would have been incurred under the Federal CCR Rule alone. (R. p. 913, lines 8-13). While the Companies seek to draw the Court's attention to the extended compliance schedule, when discussing the impact of CAMA and other North Carolina legislation, Mr. Wittliff took the extended timing of compliance actions into account in his assessment of what costs exceeded the CCR Rule. (R. p. 923, lines 10-14).

- DEP Sutton: According to Mr. Wittliff, Sutton was also identified as a "High Priority" site requiring an accelerated removal of all ash and closure of the site. (R. p. 907, lines 17-19). Being designated "High Priority" by CAMA removed cap-in-place as a viable closure strategy at Sutton, which in turn led to DEP opting to excavate and ship train- and truck-loads of CCR from ash ponds to landfill as much as 145 miles away, which increased costs over and above those that would have been incurred under the CCR Rule alone. (R. p. 913, lines 8-13). Additionally, the "CCR [R]ules would not have required closure actions at Sutton to even **commence** until October 31, 2020, while closure is required to be **completed** by August 1, 2019 under CAMA and the noted North Carolina Partial Summary Judgment."[26] (R. p. 921, lines 4-7). As a result, but for CAMA, DEP would not have been required to incur costs, for which it sought recovery in this proceeding. (R. p. 939, lines 12-14).

- DEP Weatherspoon: According to Mr. Wittliff, the costs over and above what the EPA's CCR Rule would otherwise require that are occurring at the Weatherspoon station are attributable to DEP's: (1) screening of the ash for size, (2) building active and reserve piles, and (3) shipping the processed CCR to cement kilns about 150 miles away. (R. p. 925, lines 19-21). While DEP has represented these efforts as beneficiation, only CAMA requires beneficiation. (R. p. 925, lines 21-23).

- DEP incurred CAMA specific beneficiation costs at both H.F. Lee and Cape Fear. (R. p. 919, lines 1-4; R. p. 907, lines 5-6). Because the EPA's CCR Rule does not

[26] Pursuant to ¶ 5.e. of the Order Granting Motion for Partial Summary Judgment dated June 1, 2016 (13-CVS-11032), a written Site Analysis and Removal Plan was due by December 31, 2016. Sections 3(b) and 3(c) of CAMA require excavation of the Sutton basins, with the ash disposed of in either an off-site or on-site landfill. (Sutton is a high priority site, with ash basin closure required by August 1, 2019.) (R. p. 920, lines 11-15; see also R. pp. 1978-2035 (June 1, 2016 summary judgment order)).

require beneficiation, there are no costs associated with beneficiation that are required under the CCR Rule. (R. 1039, lines 5-10). Moreover, Cape Fear was not impacted by the EPA's CCR Rule, is only designated for closure under CAMA, and all of the costs that Mr. Wittliff recommended for disallowance at Cape Fear are the result of CAMA. (R. p. 880, line 19-p. 881, line 2).

- DEC Riverbend: Mr. Wittliff testified that Riverbend was not impacted by the EPA's CCR Rule, but was designated for closure under CAMA. (R. p. 4777, lines 4-5). Additionally, CAMA classified Riverbend as a "High Priority" site, requiring an abbreviated time frame in which to remove all ash and close the site and removing cap-in-place as a viable closure strategy. (R. p. 4777, lines 16-18; R. p. 4783, lines 1-5; see also R. p. 4853, lines 18-19). As a result, DEC must completely excavate and ship by train or truck load the CCR from the ash ponds to off-site landfills as much as 125 miles away. (R. p. 4783, lines 5-7). Therefore, CAMA results in costs in excess of those that DEC would have had under the EPA's CCR Rule.

- DEC Dan River: Like Riverbend, Dan River was classified as a "High Priority" site, requiring an abbreviated time frame in which to close the site and removing cap-in-place as a viable closure strategy. (R. p. 4783, lines 1-5). Consequently, CAMA results in costs in excess of what would have been the costs under the EPA's CCR Rule. (R. p. 4783, lines 7-8).

The Companies fail to substantiate many of the allegations on pages 33 to 35 in their brief with evidence from the record and raised them for the first time in their Petition for Reconsideration. As a result, those arguments are not preserved for appeal. Furthermore, the Companies' assertion of them now is nothing more than a recitation of evidence that conflicts with evidence presented by ORS witness Wittliff. It is not proper to ask the Court to re-try the case and re-weigh the evidence, which is in essence exactly what they are seeking in this appeal. The Commission is the trier of fact, and it properly weighed all evidence put before it. (See Order No. 2019-323, R. p. 3939; Order No. 2019-341, R. pp. 104-105).

The Commission's judgment on a factual issue where there is evidence of record to support the agency's decision must be upheld. Hamm, 294 S.C. at 323, 364 S.E.2d at 456 (1988). Moreover, simply because the Companies believe a different figure should be allocated to their

South Carolina's customers is no basis for overturning Commission findings that are supported by substantial evidence, as is the situation here. See Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999).

2) The Rates the Companies Seek are not Just and Reasonable Because they Exceed What Would Otherwise Be Required to Comply with the EPA's CCR Rule.

The EPA has enacted a rule that effectively addresses the human health and environmental risks associated with the disposal of CCRs. The "EPA's goal is to ensure that [its CCR Rule and the Effluent Limitations Guideline] work together to effectively address the discharge of pollutants from steam electric generation facilities and the human health and environmental risk associated with the disposal of CCRs, without creating avoidable or unnecessary burdens." See 80 Fed. Reg. 21411. The EPA's CCR Rule "[ensures] that there will be no reasonable probability of adverse effects on health or the environment from the disposal of CCR . . . ." 80 Fed. Reg. 21304. Additionally, it accomplishes these objectives without creating avoidable or unnecessary burdens. Id. at 21411.

Thus, the federal government has established the minimum standard for reasonableness regarding CCRs. While the states are free to implement more rigid standards, that is a matter of legislative policy to be determined by the citizens of a state and their elected representatives. One state may not dictate its policy decision to another state, or seek to impose the costs of its policy on the citizens of another state. This is particularly true in the instant case, where it was the Companies' own criminal negligence that led to the enactment of the North Carolina law. Accordingly, the Commission was justified, and in fact obligated, to disallow from recovery all CCR remediation costs that exceed those that would have been incurred under the CCR Rule.

As outlined above, Mr. Wittliff reasonably determined what costs the Companies would have incurred under the CCR Rule and subtracted that from what the Companies incurred due to

CAMA to determine the appropriate disallowance. His analysis was thorough and reasonable and constitutes substantial evidence on the whole record. The evidence in the record supports the Commission's Orders, and, as a result, they should be upheld.

3) The Expenses Attributable Solely to CAMA are Not Just and Reasonable Because they were the result of the Companies' Negligence.

The Commission may determine in particular instances that expenses actually incurred by a utility should not be passed on to consumers.[27] In following its statutory obligation in this case, the Commission lawfully prohibited the Companies from recovering certain coal ash costs that were attributable solely to CAMA and unreasonable.

The facts of the record make clear DEC and DEP were negligent in their operations and maintenance of the coal ash impoundments at the coal plants for years prior to the enactment of CAMA. (R. p. 899, lines 16-22; R. p. 4770, lines 2-6). Duke management ignored the recommendations of its engineers and made specific decisions that resulted in the coal ash spill in North Carolina, which in turn led to the North Carolina General Assembly's decision to enact CAMA. (R. p. 823, line 32-p.824, line 1; R. pp. 1826-1843; R. p. 4863, lines 29-31). For the price of $20,000, DEC could have prevented the disastrous spill at Dan River and potentially billions in expenses resulting from that environmental catastrophe from being passed on to ratepayers. (R. p. 1024, line 8-p. 1026, line 3; R. pp. 1826-1843).[28]

In order to recover specific costs through the rates to customers, the Companies were obligated to show that those costs were incurred under efficient and economical management. The

[27] Utils. Servs., 392 S.C. at 105, 708 S.E.2d at 760; see also Seabrook Island Prop. Owners Ass'n, 303 S.C. at 499, 401 S.E.2d at 675 ("It is within Public Service Commission's statutorily delegated power to determine the amount of an expense that will be charged to the ratepayers.").
[28] In the present case, DEP is seeking recover of approximately $333 million from its South Carolina customers (Order 2019-341, R. pp. 48-52) and DEC is seeking approximately $470 million for its South Carolina customers. (Order No. 2019-323, R. pp. 3927-3939).

Commission considered the inaction of the Companies' management in failing to act upon the advice of their engineers, which would have easily and inexpensively prevented the spill of coal ash that led to the passage of CAMA. (Order 2019-341, R. pp. 50, 104; Order 2019-323, R. pp. 3937, 3939). The lack of efficient and economical management makes it just and reasonable for the Commission to prohibit the Companies' recovery of costs attributable solely to CAMA. As this Court noted in Hamm v. South Carolina Public Service Commission: "[i]f utility has acted unreasonably...the utility should not be permitted to pass along the higher fuel costs to its customers." 291 S.C. 119, 121, 352 S.E. 2d 476, 478 (1987) . It is clear in this case that through their negligence, the Companies have acted unreasonably, and higher costs have resulted.

Additionally, there is no doubt from the evidence in the record that the imposition of rates resulting from CAMA-specific costs would be unduly burdensome to the Companies' South Carolina customers. One public witness testified:

> Why is one of the poorest states in the country potentially being burdened with one of the highest electric rates? . . . Because Duke needs to pay for litigation expenses attributed to legal actions related to mismanagement of coal ash facilities. (2d Supp. R. p. 3, line 22-p. 4, line 2).

When discussing the Companies' negligent spill of coal ash into the Dan River, another public witness testified:

> At what point will Duke Energy have to pay for its own mistakes and not pour the debt onto the residents of the Carolinas? This increase will disproportionately affect lower-income residents. Have those individuals not suffered enough during the difficult economic times of the past few years? (2d Supp. R. p. 5, lines 5-12).

In testifying about the higher nature of the increase DEP sought, Mr. Ott, a farmer and public witness at the Florence Night Hearing, testified that he "[doesn't'] have a way to pass [DEP's requested increase] to anybody...we are just asking for some fairness in this equation."

(R. pp. 207-211).[29]

The Commission must balance the interests of the Companies' and their customers in determining just and reasonable rates,[30] and it is apparent that the costs attributable solely to CAMA are not reasonable for the Companies' South Carolina customers to bear. The Commission appropriately disallowed recovery of those costs.

4) **The Companies Concede that Certain Costs Attributable Solely to CAMA are Not Reasonable for the Companies' South Carolina Customers to Pay.**

The Companies themselves concede that it would not be just and reasonable for certain CAMA costs to be recovered from their South Carolina customers and instead only dispute the calculation of those costs. According to Duke witnesses, the costs to comply with CAMA and the federal CCR Rule are somewhat duplicative, but they agreed that there is a portion of the costs that should be directly assigned to the North Carolina ratepayers. (R. p. 389, line 22-p. 390, line 2; R. p. 4147, lines 13-17). As a result, while the Companies may disagree with the factual findings the Commission made in determining the amount of expenses that were specific to CAMA, unique to North Carolina, and appropriate for direct assignment, they do not disagree with the principle that certain CAMA costs should be directly assigned.

The costs over which the Companies are appealing, however, are unique to North Carolina. It is clear that South Carolina has adopted no law or policy that exceeds the requirements of the CCR Rule in the way CAMA does. Additionally, the Commission found that CAMA confers no

[29] The Record is replete with evidence of the unduly burdensome nature of the Companies' request. (See e.g. R. pp. 188-280 (testimony presented by farmers at the Florence Night Hearing)).
[30] See Commission Order No. 1990-75 in Docket No. 89-178-E (Feb. 2, 1990) ("The ratemaking process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests." (quoting Fed. Power Comm'n v. Nat. Gas Pipeline Co., 320 U.S. at 602-03)); see also S.C. Cable Television Ass'n, 313 S.C. at 51, 437 S.E.2d at 39.

benefits upon South Carolinians.[31] As established by substantial evidence in the record, the costs over which the Companies are appealing are appropriate for direct assignment to North Carolina and should not be imposed upon South Carolina ratepayers.

5) It Is Appropriate to Require CAMA-Specific Costs to be Borne by the North Carolina Customers While Sharing Between Both States the Costs of SCDHEC Consent Agreements the Companies Voluntarily Entered and for which They Have Already Received their *Quid Pro Quo*.

The Companies repeatedly assert that it is unjust for North Carolina customers to pay costs associated with closure of coal ash basins in South Carolina pursuant to the SCDHEC Consent Agreements, while at the same time not require South Carolina customers to pay CAMA-specific costs for the remediation of coal ash basins in North Carolina. In making this argument, the Companies are comparing apples with oranges – the two situations are simply not the same. As shown below, the record makes clear distinctions between North Carolina's CAMA and the Companies' Consent Agreements.

Importantly, unlike the situation with CAMA, the Companies voluntarily sought out these Consent Agreements and negotiated their terms with SCDHEC. (R. p. 540, lines 16-22; R. pp. 954-961). The Consent Agreements even include a clause in which SCDHEC covenants not to sue Duke Energy for actions covered in the Consent Agreement, a highly unusual covenant. (R.

[31] See Order No. 2019-341, R. p. 104 ("We further find it would not be just and reasonable for DEP's South Carolina customers to pay costs incurred solely as a result of a North Carolina law, for which no benefit is received to South Carolina's ratepayers"); Order No. 2019-323, R. p. 3911 ("The North Carolina General Assembly has the authority to create the laws that govern the business conducted in North Carolina. To subject South Carolina DEC customers to North Carolina laws which are neither necessary for the provision of power nor which confer benefits to South Carolina ratepayers would be inappropriate. The Commission cannot abdicate the sovereign nature of the South Carolina General Assembly, from which this Commission derives its authority. As a result, this Commission will not permit DEC to pass on increased expenses incurred as a result of North Carolina's CAMA.").

p. 958, lines 18-25; see R. p. 1156, line 18-p. 1157, line 3). Thus, the Companies and all of their customers have received a *quid pro quo* for entering into these Consent Agreements.

In contrast, neither the Commission nor ORS have any role in the proceedings before the North Carolina Utilities Commission to determine rates for North Carolina customers. It certainly would not be in the public interest for ORS to argue, or for the Commission to find, that because the North Carolina Utilities Commission had already determined a portion of the costs associated with the SCDHEC consent agreements are recoverable in North Carolina rates,[32] South Carolina ratepayers must of necessity help shoulder the burden of the CAMA legislation. Nor would it be in the public interest for ORS to argue, or for the Commission to find, that South Carolina customers should pay all of the costs associated with compliance with the SCDHEC Consent Agreements. Such would result in a double recovery for the Companies because the North Carolina Utilities Commission already determined North Carolina customers would pay a portion of these costs.

Additionally, the Companies' brief erroneously equates the two consent agreements at issue with the coal ash standard of South Carolina. (See Companies' Brief p. 28). SCDHEC does not set state policy through these Consent Agreements. (See R. p. 4847, line 1-p. 4850, line 15). Additionally, the Consent Agreements explicitly state that they are binding only on the Companies' H.B. Robinson Steam Electricity Plant, W.S. Lee Steam Station and SCDHEC.[33]

[32] See North Carolina Utilities Commission Order in Docket No. E-2, Sub 1142, issued on February 23, 2018, where costs associated with Robinson plant were approved for recovery by DEP's North Carolina customers and North Carolina Utilities Commission Order in Docket No. E-7, Sub 1146, issued on June 22, 2018, where costs associated with W.S. Lee were approved for recovery by the DEC's North Carolina customers.

[33] See DEP Hearing Exhibit 42, p. 1, R. p. 1314; DEC Hearing Exhibit 35, p. 1, R. p. 5994.

For all of these reasons, there is nothing unfair or unreasonable about sharing the costs of the SCDHEC Consent Agreements between the customers in the two states while not imposing on South Carolina ratepayers the costs required by CAMA that exceed what is required by either federal or South Carolina law.

6) The Commission's Orders Contain Sufficient Findings of Fact and Conclusions of Law.

The Companies' assertion that the Orders contain no findings fact or conclusions of law as to CAMA-specific costs is baseless. The Orders contain express findings of fact and conclusions of law on pages 104-105 of the Order No. 2019-341, which are supported by the facts and analysis presented on pages 39-52 of that Order, and on pages 24-26 of the Order No. 2019-323, which are supported by the facts and analysis presented on pages 41-53 of that Order. The Orders total 112 and 71 pages, respectively, and are replete with factual findings and legal conclusions. When making findings of fact and conclusions of law, no particular format is required. Able Comms., Inc. v. S.C. Pub. Serv. Comm'n, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) (citing Airco, Inc. v. Hollington, 269 S.C. 152, 236 S.E.2d 804 (1977)). In both Orders, the Commission discusses the facts as presented by all parties and utilizes those facts to form a reasoned and appropriate judgment regarding just and reasonable expenses to be recovered in rates charged to the Companies' South Carolina customers. (See Order No. 2019-341, R. pp. 39-52, 104-105; Order No. 2019-323, R. pp. 3910-3912, 3927-3939). This is more than enough to meet the legal standard.

The Commission clearly laid out and considered the evidence presented by the parties and detailed its well-reasoned analysis in reaching the conclusion that it would be unreasonable for the Company's South Carolina customers to bear the burden of the expenses incurred solely as a result of North Carolina's CAMA. The Commission balanced the interests of the Companies with those of Companies' customers (Order No. 2019-341, R. p. 51), and in denying the Companies the ability to collect unreasonable CAMA costs from their South Carolina customers, the Commission considered that those customers had no opportunity to influence the sequence of events that led to the creation of CAMA, that CAMA provided no benefit to the South Carolina customers, and that CAMA-specific costs should not be borne by the Companies' South Carolina customers. (Order No. 2019-341, R. p. 51; Order No. 2019-323, R. p. 3939). Moreover, the Commission stated that should laws under which South Carolina DEP ratepayers are governed require additional expenses incurred at a future date, DEP is not prohibited from seeking recovery of those costs at that time. (Order No. 2019-341, R. p. 52).

The evidence of record and the Commission Orders make it clear that the costs attributable solely to CAMA are not just and reasonable for the Companies' South Carolina customers. As a result, the Commission's Orders are not arbitrary or capricious, contain all required analyses, rest upon the substantial evidence in the whole record, are just and reasonable, and should be affirmed.

III. The Commission's Decision to Disallow CAMA-Specific Costs Does Not Constitute a Facial Violation of the Commerce Clause of the United States Constitution when the Commission's Orders Regulate Even-Handedly to Effectuate a Legitimate Public Interest.

The Companies argue that the Commission's Orders are facially discriminatory and in violation of the Commerce Clause of the United States Constitution. At the outset, it should be noted that this issue is not preserved for appeal. The Companies did not raise this issue at the evidentiary hearings on the Applications or in their proposed orders and briefs in support of their proposed orders following the hearings. Rather, the Companies raised this issue for the first time in their petitions for rehearing or reconsideration. It is well-established law that a party may not raise an issue for the first time in a petition for rehearing or reconsideration that it could have raised previously. See Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990);

Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1933). This Court likewise has concluded that issues raised for the first time in a petition for rehearing to the Commission are not preserved. See Kiawah Prop. Owners Grp., 359 S.C. at 113, 597 S.E.2d at 149 (2004).

The Companies present no argument that the Commission was incorrect in its decision that they failed to preserve their dormant Commerce Clause argument by not raising the issue prior to their petitions for rehearing or reconsideration. Nor do the Companies cite to any place in the record showing this issue was raised prior to the petitions for rehearing or reconsideration. The Court, thus, should affirm the Commission's conclusion the issue was not properly preserved.

Moreover, on the merits, the Commission should be affirmed. The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Or., 511 U.S. 93, 98 (1994). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38 (2008) (citation and internal quotation marks omitted). The United States Supreme Court has held that "the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only 'incidental' effects on interstate commerce or discriminates against interstate commerce." Or. Waste Sys., 511 U.S. at 99 (citation and internal quotation marks omitted). Indeed, "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987).

"While discrimination 'simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter,' not all economic harms or anticompetitive choices can or should be remedied through application of the dormant Commerce Clause." Colon Health Centers of Am., LLC v. Hazel, 813 F.3d 145, 151–52 (4th Cir. 2016) (quoting Or. Waste Sys., 511 U.S. at 99). "Under the prevailing framework courts must chart a narrow course between 'rebuff[ing] attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce . . . [and] generally supporting their right to impose even burdensome regulations in the interest of [their general police powers]." Id. at 152 (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949)). "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[34] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Federal regulation of electricity owes its beginnings to an early twentieth century United States Supreme Court decision in which the Court concluded the Commerce Clause bars states from "regulating certain interstate electricity transactions." FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 767 (2016). This early twentieth century ruling created "a regulatory void which,

[34] While noting the United States Supreme Court still "generally leave[s] the courtroom door open to [parties] invoking the rule in Pike," the Fourth Circuit has stated the judicial branch is ill equipped and not institutionally suited to apply the Pike balancing test. Colon Health Ctrs of Am., 813 F.3d at 155-56 (quoting Davis, 553 U.S. at 353). Rather, such policy decisions are ordinarily entrusted to the legislature. Id. The South Carolina General Assembly has delegated authority to the Commission to set rates.

the Court pointedly noted, only Congress could fill." Id. Congress did so through passage of the Federal Power Act ("FPA"), which grants FERC the "authority to regulate 'the transmission of electric energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce.'" Id. (quoting 16 U.S.C. § 824(b)(1)).

Importantly, the FPA also maintained an exclusive zone of state jurisdiction—regulation of within-state wholesale sales and, more importantly here, the retail sale of electricity directly to users. Id. at 767-68. In the context of the FPA's companion Act for natural gas, the Natural Gas Act of 1938, the Supreme Court has construed the Act as "altogether exempting state regulation of in-state retail sales of natural gas from attack under the dormant Commerce Clause." Gen. Motors Corp. v. Tracy, 519 U.S. 278, 292 (1997) (emphasis added). While the Supreme Court no longer applies a similar bright-line rule for electricity, it continues to recognize "the powerful state interest in regulating sales to domestic consumers buying at retail." Id. at 291 n.8.

It is against this backdrop that the Companies' arguments must be considered. As an initial matter, alleged dormant Commerce Clause violations generally involve challenges to statutes, regulations, and ordinances that have broad applicability, not a regulatory body's rulings on individual utilities' applications to raise their rates. The Companies cite no case where a facial dormant Commerce Clause challenge was successful or even considered under such circumstances. One problem with basing a dormant Commerce Clause challenge on a regulatory body's rulings in an individual case is the non-existence of an evidentiary record on which to argue the rulings have discriminated against interstate commerce in practical effect. See Colon Health Ctrs., 813 F.3d at 152 (explaining a statute may discriminate against interstate commerce "facially, in its practical effect, or in its purpose"). Regardless, the Companies raise only a facial challenge here.

The Court should reject the Companies' argument. If accepted, it would destroy the Commission's legislatively and constitutionally granted authority to determine rates that are just and reasonable for South Carolina's customers to pay a utility that operates in more than one state. Instead, the Commission would have to follow rulings by the North Carolina Utilities Commission regarding what costs associated with the generation of electricity at the Companies' coal-fired plants in North Carolina are recoverable in rates. Unless of course, the Commission ruled on the issue first and the Companies found the ruling favorable, then presumably they would argue North Carolina has to follow South Carolina precedent. Neither the Commerce Clause, nor reason and logic, require either state's agency to surrender its independence to the other, depending on which one addresses the issue first.

Thus, the Commission's rulings are not grounded in economic protectionism but rather its mandate to set just and reasonable rates and ensure that South Carolina customers do not pay unreasonable costs they neither caused nor from which they derive any benefit. The Commission's rulings, thus, regulate even-handedly to effectuate a legitimate local public interest. Any effects from the Commission's rulings on interstate commerce are only incidental and are not clearly excessive in relation to the putative local benefits. While the Companies may prefer not to be subject to different state regulatory regimes and regulatory rulings on what costs they may recover, "this burden is a necessary consequence of doing business in more than one state" and Congress's decision to leave regulation of retail sales to states.[35] State of North Carolina ex rel Utils. Comm'n, 450 S.E.2d at 902.

[35] The cases the Companies cite in their brief do not support their argument. In LSP Transmission Holdings, LLC v. Sieben, the Eighth Circuit Court of Appeals held that a Minnesota statute which granted incumbent electric utilities a right of first refusal to build and own electric transmission lines connecting to their existing facilities did not violate the dormant Commerce Clause. 954 F.3d 1018 (8th Cir. 2020). The Fourth Circuit, in Colon Health Centers of America, LLC v. Hazel,

IV. The Commission Correctly Disallowed Coal Ash Litigation Expenses when the Companies Failed to Provide Sufficient Documentation to Support Their Claimed Expenses.

The Commission properly denied the Companies' requests to recover coal ash litigation expenses because the Companies failed to provide the substantial evidence of record before the Commission to meet their burden of proof. DEP failed to substantiate $390,000 in litigation expenses and DEC $575,000 in litigation expenses for which both companies seek recovery. (Order No. 2019-341, R. pp. 69-75; Order No. 2019-323, R. p. 3949). ORS's challenge to the coal ash litigation expenses rebutted the presumption of reasonableness, and the Companies thereafter failed to provide substantial evidence to show that the specific challenged coal ash litigation expenses were reasonably recoverable from customers. The Companies had the complete responsibility to present a comprehensive record from which the Commission could determine a basis for allowing recovery from customers, and they did not meet that burden.

ORS challenged the Companies' coal ash litigation costs through direct testimony in the DEP case and supplemental direct testimony in the DEC case asserting that South Carolina customers should not pay for litigation expenses related to the Companies' negligent failure to operate their coal ash basins in accordance with state and federal rules and regulations. (See R. p. 4879, line 13-p. 4880, line 2; R. p. 1125, lines 11-22). ORS also presented evidence that the challenged coal ash litigation expenses were related to DEC and DEP's criminal and civil negligence in their operations and maintenance of coal ash impoundments. (R. p. 899, lines 13-22;

concluded the requirement under Virginia law of obtaining a certificate of need to establish or expand medical facilities and services did not violate the dormant Commerce Clause. 813 F.3d 145 (4th Cir. 2016). Finally, in Commonwealth of Pennsylvania v. West Virginia, 262 U.S. 553 (1923), the United States Supreme Court held a law that required pipeline companies to prefer local customers to interstate customers when supplying natural gas violated the dormant Commerce Clause. No similar law is at issue here.

R. pp. 1978-2035, 2115-2169; R. p. 672, line 15-p. 673, line 2; R. p. 4652, line 15-p. 4653, line 2; R. p. 4769, line 21-p. 4770, line 8; R. pp. 5479-5578).

ORS's review of coal ash litigation expenses began well before the hearing and required the Companies' involvement and awareness. On February 27, 2019, ORS served discovery relating to coal ash litigation expenses specifically. (See R. pp. 6053-6058, 2475-3820). From that point, the Companies were on notice of the need to produce substantial evidence to support the claimed coal ash litigation expenses but failed to do their due diligence. Even so, ORS's discovery and review process was reasonably calculated to produce information that would have supported recovery. (See R. p. 4952, line 25-p. 4953, line 14; R. p. 4956, lines 11-20; R. p. 4988, lines 2-18; R. pp. 5046-5050; see also R. p. 1106, lines 1-10). While the Companies argue they were sandbagged (see Appellants Brief 38-39), the DEC hearing record roundly reflects surprise that the Companies had done so little to support their request. (See, e.g., R. p. 4988, lines 2-13; R. p. 5041, line 9-p. 5042, R. p. 5049, line 1-p. 5050, line 4; R. p. 5053, line 22-p. 5055, line 18; R. p. 5063, line 11-p. 5064, line 14).

The Companies never developed a comprehensive record that identified the relevant details of the hundreds of individual coal ash litigation expenses they sought to recover from South Carolina customers. The Companies asserted in rebuttal testimony that the challenged coal ash litigation expenses related to ongoing insurance recovery litigation and the defense of state enforcement actions, but failed to explain the management and legal factors that necessitated the coal ash litigation expenses, to identify concrete, realized customer benefits, or to explain the details of individual expenses. (See R. p. 4650, line 2-p. 4653, line 16; R. p. 4921, line 20-p. 4924, line 14; R. p. 670, line 2-p. 674, line 2; R. p. 1099, line 2-p. 1101, line 20). ORS's surrebuttal testimony discussed the Companies' failure to provide any clear and detailed information supporting a claim for recovery of hundreds of thousands of dollars of coal ash litigation expenses challenged by ORS. (See R. p. 4929, line 6-p. 4935, line 15; R. p. 1099, line 2-p. 1101, line 20; R. p. 1103, line 6-p. 1109, line 20; R. p. 2470).

It was the Companies' responsibility as applicants to meet their burden of proof, and they should have presented all the evidence needed to recover the requested expenses in pre-filed testimony. Utils. Servs., 392 S.C. at 106, 708 S.E.2d 761; see also S.C. Code Ann. Regs. 103-845(C) ("All parties of record, insofar as it is practicable, should pre-file with all other parties of record copies of prepared testimony and exhibits which the party of record proposes to use during a hearing."); S.C. Code Ann. Regs. 103-848(B) ("Whenever practicable, the parties should exchange copies of exhibits which they propose to use prior to the hearing.")

The Companies' introduction of a late-filed exhibit in the DEC case and non-pre-filed evidence to support the recovery of the coal ash litigation expenses on cross-examination in the DEP case amounts to acknowledgment that they had failed to present the Commission with adequate information to justify recovery of their requested coal ash litigation expenses. (R. p. 5117, line 16-p. 5118, line 20; R. pp. 6059-6100; R. p. 1165, lines 2-11; R. p. 1167, line 22-p. 1168, line 3; R. pp. 2475-3820). These exhibits, essentially line-item listings of litigation expenses and some narrative explanations of the litigation matters, were still insufficient to meet the Companies' burden and are fairly characterized as a data-dump. (R. pp. 6059-6100, 2475-3820; see also R. p. 1192, line 17-p. 1193, line 23). The Companies did not sponsor any witnesses who could explain the expenses listed in these exhibits and why they were properly recoverable from customers. The Companies confuse providing voluminous additional information via a data-dump with providing the clear explanations for the coal ash litigation expenses that it was incumbent upon them to provide to support recovery. (R. p. 1174, line 25-p. 1175, line 24).

The Companies are correct that a utility is entitled to a presumption that its expenditures were reasonable and incurred in good faith. Utils. Servs., 392 S.C. at 109-10, 708 S.E.2d at 762-63. But that presumption "clearly does not foreclose scrutiny and a challenge. In those circumstances, the burden remains on the utility to demonstrate the reasonableness of its costs." Id. (citing Hamm, 309 S.C. at 286-287, 422 S.E.2d at 112-113 (1992)). Substantial evidence in the record challenged whether the coal ash litigation expenses were incurred in the ordinary course of business and under prudent management. (E.g., R. p. 899, lines 13-22; R. pp. 1978-2035, 2115-2169; R. p. 672, line 15-p. 673, line 2; R. p. 1097, line 23-p. 1101, line 20; R. p. 4839, lines 21-25; R. p. 4652, line 15-p. 4653, line 2; R. p. 4769, line 21-p. 4770, line 8; R. pp. 5479-5578; see also R. p. 4924, lines 11-14; R. p. 4979, line 9-p. 4980, line 1). The Companies had the obligation to substantiate their claim to recover coal ash litigation expenditures from South Carolina customers. See Utils. Servs., 392 S.C. at 110, 708 S.E.2d at 762–63. They did not do so and should not now be heard to claim unfair surprise.

In their initial brief and statement of issues, the Duke Entities frame the issue as whether they received an ample opportunity to explain and justify these expenses. However, the Companies' Petitions for Reconsideration only addressed the presumption of reasonableness and not an alleged insufficient opportunity to justify the expenditures. (R. pp. 4033-4034; R. p. 184). As a result, the Companies failed to preserve the issue of whether they had a sufficient opportunity to justify the expenditures by not including the issue in their petitions for rehearing or reconsideration and obtaining a ruling from the Commission on the issue. See, e.g., Brown v. S.C. Dep't of Health and Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (holding issues not raised to and ruled upon by Administrative Law Court unpreserved for appellate review).

Based on the limited and incomplete record developed by the Companies regarding the coal ash litigation expenses, the Commission simply could not tell why the expenses were incurred. The Commission faced the choice of allowing recovery on the basis of "surmise, speculation, or conjecture" or denying recovery because the Duke Entities failed to carry their burden. See Daufuskie Island Util. Co., 420 S.C. at 317, 803 S.E.2d at 286 (citation omitted). The Companies had a meaningful chance to explain these expenses through prefiled testimony and through the hearings. Utils. Servs. 392 S.C. at 108-09, 708 S.E.2d at 761-62; Hilton Head Plantation Utils., Inc. v. Pub. Serv. Comm'n, 312 S.C. 448, 449–52, 441 S.E.2d 321, 322–23 (1994).

Based on the evidence introduced by the Companies, the Commission could not have concluded the coal ash litigation expenses were recoverable from customers without acting arbitrarily. In accordance with the only option reasonably available under the law as established by this Court, the Commission properly disallowed recovery.

V. The Commission Correctly Disallowed a Return on Certain Deferrals Upon a Determination that the Appropriate Balance of the Companies' and Their Customers' Interests Required the Recovery of Deferred Operating Costs and a Return on Capital Costs.

In their Applications for rate relief filed with the Commission, the Companies requested approval of both their recovery of deferred costs, which had accumulated since their last rate cases, and in addition, a Weighted Average Cost of Capital ("WACC") return on those deferred costs. The Companies further requested to include the unamortized balance of each deferral in rate base.

In order to defer costs, a utility must first seek an accounting order. Accounting orders are used by utilities to smooth earnings and rate recovery related to significant costs that arise from circumstances that are unexpected and/or non-recurring. (R. p. 1061, lines 19-20). An accounting order to defer costs is a regulatory instrument by which a commission issues an order at a utility's request establishing a regulatory asset (or liability) account into which costs can be deferred. (R.

p. 1060, lines 13-15). Provided the commission grants a utility's request to defer costs, the utility creates a regulatory asset account on its balance sheet and records costs to the regulatory asset as those costs are incurred. (R. p. 1061, lines 13-15). The utility may then seek to recover regulatory assets in a future general rate case proceeding. (R. p. 1061, lines 15-16).

As an initial step in considering the Companies' requests regarding deferrals, the Commission agreed with ORS in separating the deferred costs into two categories: operating related costs and capital related costs.[36] The Commission further agreed to allowing the Companies recovery of most deferred costs but denied the request that all unamortized balances be included in the calculation of the Companies' rate bases.

In total, the Companies proposed the recovery of deferrals through five adjustments: costs included in deferrals granted before the Companies' last rate cases, deferred environmental costs, South Carolina Advanced Metering Infrastructure ("AMI") costs, Customer Connect costs, and South Carolina Grid Modification costs. However, the Companies provide no authority that supports the position that they are entitled to the requested treatments of deferred costs. That is because there is none. The treatment of deferrals has always been a matter within the discretion of the Commission, which has a duty to balance the needs of the utility and the utility's customers such that the public is served without harming the financial well-being of the utility. "[T]he fixing of 'just and reasonable' rates involve a balancing of the investor and the customer interests." Hope, 320 U.S. at 603. In a ratemaking application the Commission is the ultimate factfinder and has the power to independently determine whether an applicant has met its burden of proof. See Utils.

[36] Operating related costs generally include every expense that is not a capital asset expenditure. Examples of operating related costs include depreciation, income taxes, and purchase power. (R. p. 1091, line 21-p. 1092, line 2). Capital related costs are any cost that is charged to a company's rate base. (R. p. 1093, lines 1-5).

Servs., 392 S.C. at 106, 708 S.E.2d at 761. Further, the Commission has the broad discretion to determine that some portion of an expense actually incurred by a utility should not be passed on to consumers. Id. "The Commission sits as the trier of facts, akin to a jury of experts." Hamm, 309 S.C. at 287, 422 S.E.2d at 113 (1992) (citing So. Bell Tel. & Tel. Co., 270 S.C. at 597, 244 S.E.2d at 282).

There is no accounting rule or legal authority that establishes that a utility has a right or entitlement to a return on any deferred cost. This further highlights the discretion to which the Commission is entitled in reaching its conclusions regarding the treatment of the Companies' deferrals. The testimony of ORS witness Zachary Payne provided the Commission with the evidence needed to reach the conclusions and findings contained in its Orders. Mr. Payne discussed how regulatory commissions in other jurisdictions, which have considered the issue of deferrals and returns on deferrals, have used their discretion to adopt a variety of approaches. (R. pp. 1081-1083, 4914-4916).

The discretion afforded the Commission allows it to act in a manner that may influence the actions of the utilities that it regulates. "The PSC is entitled to create incentives for utilities to improve their business practices. Accordingly, the PSC may determine that some portion of an expense actually incurred by a utility should not be passed on to consumers." Utils. Servs., 392 S.C. at 105, 708 S.E.2d at 760 (citing Patton, 280 S.C. at 292, 312 S.E.2d at 259–60).

In this respect, there are several problems with the positions taken by the Companies. First, the Companies' proposed return on their deferrals, if approved by the Commission or this Court, would essentially encourage utilities to seek deferrals on any and all variety of Operation and

Maintenance expenses, including those not classified as "extraordinary."[37] This is counter to the historical test year used to establish utility rates in South Carolina and could have the effect of greatly inflating the utilities' costs and thus the rates being charged to the utilities' customers. Secondly, the Companies' position that they should be entitled to a return on, as well as rate-based treatment of, operating expenses, ignores the fact that operating expenses are traditionally, in South Carolina and throughout the country, collected through rates without a return. In 2017 DEP collected $562,000,000 in operating revenues from its South Carolina customers through rates that were designed, by the Company's prior rate case, to allow the recovery of the Company's operating costs, as well as a reasonable return on capital investments. (R. pp. 1080-1081). In the same period DEC collected over $1.7 billion in operating revenues. (R. p. 6005, line 1). These revenues were collected from customers based on rates established in the Companies' last general rate cases to compensate them for their then-current expenses. Allowing them to "bank" certain additional costs runs counter to the historical test year method of rate making.

The Companies also argue that the Commission is obligated to grant the Companies' requested treatment of deferrals on the basis that the Commission approved the Companies' prior requests to defer these expenses in previously issued Accounting Orders. However, those prior orders of the Commission provide no guarantee or promise to the utilities that they will be entitled to recover those deferred costs, let alone any return on those costs. To the contrary, the Commission explicitly stated in the orders authorizing creation of the deferral accounts that cost

[37] A classification of "extraordinary" is traditionally the base threshold that an event must meet in order for a utility to request and receive an Accounting Order to defer its associated costs. However, being extraordinary does not impact a subsequent review of cost recovery, and ORS does not necessarily concede an event is extraordinary by consenting to the creation of a deferral.

recoverability would be addressed at a later time.[38]

The Companies fundamentally mis-state what the Commission approved in Docket No. 2013-472-E. The Companies' assert that "the Commission [] previously approved a return on deferrals in PSC Order No. 2014-138 in Docket No. 2013-472-E (2014)[.]" (Companies' Brief, p. 44). Actually, the Commission granted DEP the right to defer certain costs in a regulatory asset account to preserve the Company's right to seek recovery. (See Commission Order No. 2014-138 at 6-7 in Docket No. 2014-138 (Jan. 30, 2014)). As DEP even stated in its Petition for that Accounting Order, "[t]he accounting order granting relief DEP seeks in this petition will not preclude the Commission from addressing the reasonableness of the cost deferred in . . . regulatory asset and liability accounts in the next general rate proceeding." (R. p. 1089, line 19-23) (emphasis added). Additionally, as quoted in the testimony of ORS witness Payne at the hearing, the specific language of that Order states just the opposite. That Order provides that "[g]ranting the deferrals will not preclude this commission or any party from addressing the reasonableness of the costs deferred in regulatory asset and liability accounts in the next general rate proceeding." (R. pp. 1064-1065). Finally, in a later Order in that same docket issued in 2016 the Commission again specifically states that "[t]his Order does not preclude the Commission or any party from addressing the reasonableness of the expenses in a subsequent general rate case or other proceeding." (Commission Order No. 2016-36 issued in Docket No. 2013-472-E) (emphasis added).

[38] See R. pp. 1064-1065 (Commission Order No. 2014-138 in Docket No. 2013-472-E (Jan. 30, 2014); R. p. 1067 (Commission Order No. 2016-490 in Docket No. 2016-196-E (July 13, 2016)); R. p. 1069 (Commission Order No. 2018-553 in Docket No. 2018-205-E (Aug. 9, 2018)); R. pp. 1072-1073 (Commission Order No. 2018-751 in Docket No. 2018-206-E (Nov. 13, 2018)); R. pp. 4899-4091 (Commission Order No. 2018-552); R. pp. 4902-4903 (Commission Order No. 2016-490); R. pp. 4904-4905 (Commission Order No. 2016-489); R. p. 4906 (Commission Order No. 2018-552); R. p. 4908 (Commission Order No. 2018-751).

Directly counter to the numerous assertions made in Companies' brief, both ORS and the Commission, in every single case cited, made the same disclaimer that the deferrals were subject to review in the next general rate case. ORS witness Payne testified to the specific provisions in these prior orders of the Commission in both the DEC and DEP hearings.[39] The Companies could not have reasonably expected a guaranteed return on their deferred expenses. In fact, it would have been unreasonable for the Companies to expect a guaranteed return, given that the petitions for deferral orders, which cover expenses going back nearly 20 years, were issued without a hearing, without notice, and without an opportunity to be heard. (R. p. 1090, line 12-25; 2d Supp. R. p. 1, line 1-p. 2, line 8).

As further shown through the testimony of ORS witness Payne in both the DEC and DEP hearings, the National Association of Regulatory Utility Commissioners Rate Case and Audit Manual, generally accepted as an authority in utility ratemaking, does not promote the provision of a return on deferred costs, but rather recommends that the regulatory authority examine the deferral to determine whether a return or rate-based treatment is appropriate. (R. pp. 1062, 4898). Based on the evidence and testimony presented by ORS, the Commission appropriately exercised its discretion in finding in both cases that the Companies should be permitted to only recover prudently incurred operating expenses, without a WACC return or rate base treatment.

The Commission further provided that the Companies were permitted to recover prudently incurred capital costs by recording capital costs to rate base and recovering those costs through depreciation expense over the life of the associated asset, while earning a WACC return on the undepreciated balance. (See Commission Order No. 2019-341, R. pp. 91-98; Commission Order No. 2019-323, R. pp. 3910, 3915, 3916, 3922-3923, 3940, 3946-3948). Except for deferred

[39] See fn. 38, supra.

environmental costs contained in ORS Adjustment #18 related to costs associated with CAMA discussed previously in this brief, which the Commission disallowed, the Commission Orders allow the Companies to fully recover their actual deferred expenses. The Commission Orders only restrict how those costs may be recovered. In practical effect, both Orders simply removed the economic windfall that the Companies sought. The Commission Orders fairly balance the interests of both the public and the utility by allowing for a recovery of costs incurred by the Companies and, where appropriate, a reasonable return on capital related costs.

The Companies' proposal to both recover a WACC on all deferrals and to also include in rate base all unamortized amounts, essentially would allow the company a double recovery.[40] In providing that the Companies may recover carrying costs associated with its capital-related investments, the Commission acted in a manner that balances the interests of the customers with those of the utility and follows the well-established regulatory policy that capital investments are entitled to carrying costs, while other expenses are not. As stated in the Commission Order citing Mr. David Parcell, an ORS witness with more than 40 years of utility rate case experience, "[i]n simple terms, 'rate base and operating expenses are treated differently, with only rate base items being eligible for a return.'" (Order No. 2019-341, R. p. 96 citing R. p. 603). This position, taken by the Commission in the present cases, is backed by objective criteria that should provide clear expectations for utilities in South Carolina, as well as customers and their representatives.

"There is ... a long-standing, but unwritten, rule that governs cost recovery and lies at the heart of establishing regulated prices. This rule is known as the regulatory compact. Under the

[40] If the Companies were permitted to earn a WACC on all components of deferrals, including expenses, and place those items in rate base, the Companies would be recovering return on return and return on items the Companies would have never earned a return on but only a return of had they not been in a regulatory liability account and instead been recovered through the Companies' rates set based on the test year methodology.

regulatory compact, the regulator grants the company a protected monopoly, essentially a franchise, for the sale and distribution of electricity or natural gas to customers in its defined service territory. In return, the company commits to supply the full quantities demanded by those customers at a price calculated to cover all operating costs plus a 'reasonable' return on the capital invested in the enterprise." Scott Hempling, What "Regulatory Compact"? (May 14, 2020), available at https://www.scotthemplinglaw.com/essays/what-regulatory-compact (footnote omitted) (quoting Jonathan Lesser and Leonardo Giacchino, *Fundamentals of Energy Regulation* 43 (2007)). This general principle, followed throughout this country since Bluefield was decided in 1923, is that a utility is entitled to a "reasonable" return on capital investments. This right to a return does not include a return on operational or maintenance expenses. In demanding not only that its deferred costs be put into rates, but also that it be entitled to charge customers for a healthy return on those costs, the Company is asking the Court to ignore the basic ratemaking principle that a utility has no right to the kind of profits that may be realized in "highly profitable" enterprises. See Bluefield, 262 U.S. at 692-93; see also Hope, 320 U.S. at 602-03.

The Hope and Bluefield cases specifically provide that a regulated utility is entitled to the opportunity to earn a return on "invested capital" similar to that being earned in other businesses in the same general part of the country and with similar risks. See Bluefield, 262 U.S. at 692-93; see also Hope, 320 U.S. at 603-04. The Hope and Bluefield standards have been applied by both the Commission and this Court. See So. Bell Tel. & Tel. Co., 270 S.C. at 596, 244 S.E.2d at 281; Commission Order No. 2020-306 at 33-34 in Docket No. 2019-290-WS (Apr. 9, 2020).

The lack of any precedent to support the Companies' position is also evidenced by their effort to use their accounting witnesses' opinion testimony to support their argument that the Companies are entitled to dictate the terms of their recovery of deferred costs. Company accounting witness opinions that approval of a return on their deferrals means that utility companies will not need to file rate cases as frequently is simply surmise and conjecture and is not based on any law, regulation or enforceable agreement with the Companies. (E.g. R. p. 5021, lines 7-24; R. p. 365, line 10-p.366, line 10; see also R. p. 524, lines 7-21). The Court should not allow the Companies to collect a return on these operational costs based primarily on the Companies' employees' testimony that the Companies will not file rate cases as often if they are allowed to over-collect what they are currently entitled to. There is no evidence in the record in these cases, or any prevailing legal theory, that supports the claims made by the Companies' witness Bateman that the over collection sought by the Companies actually will benefit customers. Similarly, there is no law or precedent to support the Companies' bald allegation that the Commission erred as a matter of law when it classified any portion of the costs it authorized to be included in a deferred account as not capital related.

ORS does not dispute the position stated in the Companies' brief that the Commission frequently allows utilities to establish deferral accounts. However, the Companies err in attempting to boot-strap that practice to a conclusion that the Commission not only approved the deferred costs, but thereby automatically guaranteed to the utilities that they would be entitled to earn a return on those deferred costs in the next general rate case. As shown above, this is clearly not the case.

The Companies have not been unfairly treated by the Commission, nor are they suffering financial hardship as a result of the ruling by the Commission regarding deferrals. The Commission is the "expert" designated by the legislature to make policy determinations regarding utility rates, and it appropriately struck a proper balance between the interests of the Companies and those of its customers by allowing the Companies to recover carrying costs associated with capital-related investments but denying their ability to recover such a return on non-capital related expenses. The Commission has also provided an equitable sharing of the Companies' deferred non-capital related costs by allowing them to obtain recovery of all other deferred costs, except for coal ash. The Companies thus have not been denied the opportunity to recover all of their costs associated with these deferred operation and maintenance expenses. The Commission's expert determination regarding the impact of these deferrals on customers rates should be given deference by the Court. See S.C. Energy Users Comm., 388 S.C. at 490, 697 S.E.2d at 590 (citing Kiawah Prop. Owners Grp., 359 S.C. at 109, 597 S.E.2d at 147.

In short, the Commission acted within the scope of its statutory authority in exercising its discretion to deny the Companies' requests to earn a return on certain deferred costs or include the balance of these deferrals in rate base. The Commission did allow the Companies to recover a return of all their deferred costs, with the exception of certain coal ash costs that were disallowed based on the testimony of ORS witness Dan Wittliff as discussed previously in this brief. (See Order No. 2019-341, R. p. 97; Order No. 2019-323, R. pp. 3915, 3916, 3922-3923, 3940, 3946-3948; see also R. p. 1081, lines 14-16; R. p. 4914, lines 14-16). There is no objective right, entitlement, or guarantee for a utility to recover a monetary return on deferred costs.

CONCLUSION

The Commission's Orders were based on reliable, probative, and substantial evidence on the whole record. ORS respectfully requests that the Court affirm Commission Order Nos. 2019-341, 2019-454, 2019-323 and 2019-455.

Respectfully submitted,

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